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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 789

LOCAL 2 OF THE OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, ETC., ET AL.,
Petitioners,

v.

PARAMOUNT PLASTERERS, INC., ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

Page

Opinions Below 2

Jurisdiction 2

Question Presented 2

Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 7

(a) The Industry Promotion Corporation Was Not a "Representative of Employees" 10

(b) Failure of Congress to Specifically Exclude Such Joint Promotional Funds Did Not Imply That Section 302 Prohibits Their Existence 14

Conclusion 16

Appendix A—Opinion of the United States District Court for the Southern District of California, Central Division, delivered June 5, 1961 .... 1a

Appendix B—Opinion of the United States Court of Appeals for the Ninth Circuit, delivered November 7, 1962 .... 46a

Appendix C—Pertinent Statutory Provisions 71a

CASES CITED

Arroyo v. *United States*, 359 U.S. 419 (1959) 15

Conditioned Air and Refrigeration Company, et al. v. *Plumbing and Pipefitting Labor Management Relations Trust*, 159 F. Supp. 887 (D.C. Cal., 1956) aff'd 253 F. 2d 427 (9th Cir., 1958) 13

Detroit Resilient Floor Decorators Local 2265 of the United Brotherhood of Carpenters and Joiners of America, et al., 136 NLRB No. 76 (March 30, 1962) 13

William Dunbar Company v. *Painters and Glaziers District Council*, 129 F. Supp. 417 (D.C.D.C., 1955) . . 11

Page

Employing Plasterers Association of Chicago v. *Journeymen Plasterers Protective and Benevolent Society of Chicago*, 177 F. Supp. 688 (N.D. Ill. E. D., 1959), rev'd in part 279 F. 2d 92 (7th Cir., 1960) . . 10, 11
Federal Communications Commission v. *American Broadcasting Company*, 347 U.S. 286 (1954) 15
International Association of Machinists, et al. v. *S. B. Street*, 367 U.S. 740 (1961) 8
Kane v. *Shulton, Inc.*, 189 F. Supp. 882 (D.C.N.J., 1960) 15
McCloskey, et al., 50 LRRM 1430 13
Mechanical Contractors Association of Philadelphia, Inc. v. *Local 420, et al.*, 265 F. 2d 607 (3rd Cir., 1959) 14
National Labor Relations Board v. *Wooster Division of Borg Warner Corp.*, 356 U.S. 342 (1958) 12
Shapiro v. *Rosenbaum*, 171 F. Supp. 875 11
Sheet Metal Contractors Association v. *Sheet Metal Workers International Association*, 248 F. 2d 307 (9th Cir., 1957), cert. denied 355 U.S. 924 (1958) . . 13
Southern Louisiana Chapter, Inc. v. *Local Union 130*, 171 F. Supp. 432 (E.D. La., 1959) 13
United Marine Division v. *Essex Transportation Co.*, 216 F. 2d 411 (3rd Cir., 1954) 10
United States v. *Alaimo*, 191 F. Supp. 625 (M.D. Pa., 1961) 11
United States v. *Annunziato*, 293 F. 2d 373 (3rd Cir., 1961) 11
United States v. *Lipp*, 190 F. Supp. 604 (D.C. Del., 1961) 11
United States v. *Resnick*, 299 U.S. 207 (1936) 15
United States v. *Ryan*, 350 U.S. 297 (1956) 11, 12, 14

STATUTORY CITATIONS

Jurisdictional Statutes, 28 U.S.C. Section 1254(1) 2

Labor Management Relations Act of 1947, as amended —161 Stat. 136, 29 U.S.C. Section 141, et seq.

Section 2(4), (5) 3, 12
Section 10(k) 8

Page

Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 541; 29 U.S.C. Section 186. . 2, 3, 6, 7, 9, 10, 12, 14, 15, 16

Public Law 308, 75th Congress, 50 Stat. 664-665, 29 U.S.C. Section 50-50(b) 8

MISCELLANEOUS CITATIONS

Crawford, Construction of Statutes, 609-610 (1940) . . . 15

Kuhn, *Recent Jurisdictional Developments in Organized Labor*, in New Dimension and Collective Bargaining (Davey, Kaltenborn, Ruttenberg Industrial Research Associations), Pub. 21, 1959 8

IN THE

Supreme Court of the United States

October Term, 1962

No. ———

Local 2 of the Operative Plasterers and Cement Masons International Association, Etc., et al., *Petitioners,*

v.

Paramount Plasterers, Inc., et al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Local Unions No. 2, 194, 243, 400, 489, 739 and 838 of the Operative Plasterers and Cement Masons International Association; the Operative Plasterers and Cement Masons International Association; The Contracting Plasterers Association of Southern California, Inc.; the Southern California Plastering Institute, Inc.; Ray Carter, Reuben R. Partin, A. H. Gallardo, Al Lethbridge, Ray Baker, George Cole, Elmer Croshaw, Al Seay, Eugene D. Ferguson, Hugh L. Sosbee, George M. Raymond, A. D. Heppe, C. A. Reischel, James C. Peacock, J. R. Cruz, Paul Calcaterra and E. D. Carthy pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on November 7, 1962, affirming the judgment of the United States District Court for the Southern District of California, Central Division, in favor of Respondents.

OPINIONS BELOW

The Opinion, Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of California, Central Division, printed as Appendix A hereto, *infra,* is reported in 195 F. Supp. 287.

The Opinion of the United States Court of Appeals for the Ninth Circuit, printed together with the judgment as Appendix B hereto, *infra,* is not as yet officially reported. It is unofficially reported in 51 LRRM 2486 and 46 L.C. ¶ 17,912.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1962 (R. 255). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether either a trust or non-profit corporation, jointly administered by labor and management, to which employers contribute under collective bargaining agreements is legal and proper within the meaning of Section 302 of the Labor Management Relations Act, as amended (29 U.S.C. 186) when it functions as a separate and independent legal entity for cooperatively dealing with promotion of an industry.

STATUTES INVOLVED

Sections 302(a), (b), (c), (d) and (e) of the Labor Management Relations Act, as amended, 61 Stat. 157, 29 U.S.C. Section 186.

Section 2(4) of the National Labor Relations Act, as amended, 20 U.S.C. Section 152(4).

Section 2(5) of the National Labor Relations Act, as amended, 29 U.S.C. Section 152(5).

The foregoing statutory provisions involved in this case are printed in Appendix C, *infra*.

STATEMENT OF THE CASE

The action in the instant case was based ~~on~~ Section 302 of the Labor Management Relations Act as amended (29 U.S.C. 186) (hereinafter referred to as "Section 302"), which prohibits certain payments by an employer to a union or its representative with certain specific exceptions.[1] Jurisdiction for the injunctive relief sought was based on Section 302(e), and the declaratory relief sought rested on the provisions of 28 U.S.C. Sections 2201 and 2202.

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[1] Sections 302(a), (b) and (d) make it a federal crime ". . . for any employer . . . to pay, lend, or deliver, or agree to pay, lend or deliver any money or other thing of value—(1) to any representative of his employees who are employed in an industry affecting commerce . . ." and ". . . for any person to request, demand, receive or accept or agree to receive or accept any payment, loan or delivery of money or other thing of value probited by subsection (a)." Section 302(c) further provides that: "The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative for the sole and exclusive benefit of the employees of such employer . . . or (6) with respect to money or other thing of value paid by any employer for the purpose of pooled vacations, holiday or severance, or similar benefits or defraying costs of apprenticeship or other training programs."

The material facts of this controversy were stipulated. The Respondent employers, who are engaged in the lathing and plastering business in the State of California, were individual signatories to a collective bargaining agreement entered into by and between the Petitioner Unions and the Contracting Plasterers Association of Southern California, Inc. (hereinafter referred to as the "Contractors Association").

The agreement contained a requirement that all signatory employers contribute a specified sum per hour for each hour worked by their employees to the Southern California Plastering Institute Trust (hereinafter referred to as "Institute Trust") (R. 214). The Institute Trust acts merely as a collection agency for the purpose of receiving employer contributions for Health and Welfare, Pension, Vacation, Trade Promotion and Labor-Management matters. The Institute Trust pays over contributions collected to various jointly administered trust funds. Under attack in the instant suit were the trust funds for Trade Promotion and Labor-Management matters, namely the Southern California Plastering Institute Industry Program (hereinafter referred to as the "Industry Promotion Fund") and the Labor-Management Relations Trust (hereinafter referred to as the "Labor-Management Fund").

The Institute Trust, the Industry Promotion Fund and the Labor-Management Fund require that the employers and the employees be equally represented in the administration of such trusts through a board of trustees, one-half of whom are appointed by the Contractors Association and one-half appointed by the signatory Unions (R. 204).

After the complaint in the instant matter was filed the Petitioner Unions and Contractors Association formed a non-profit corporation under the laws of the State of California, called the Southern California Plastering Institute, Inc. (hereinafter referred to as the "Industry Promotion Corporation") (R. 107-108). The Institute Trust, the Industry Promotion Fund and the Labor-Management Fund were all dissolved and their assets transferred to the newly formed Industry Promotion Corporation (R. 107-108). The collective bargaining agreement was amended to reflect these changes (R. 111).

The purpose of the Industry Promotion Corporation was limited to maintaining the purpose of the defunct Industry Promotion Fund, namely the promotion of industry betterment and industry public relations for the lathing and plastering industry to stimulate the use of lath and plaster (R. 196, 234-235). Its objects are spelled out in the Articles of Incorporation (R. 196). The Articles of Incorporation did not designate the members of the corporation but the By-laws authorized twenty-four (24) directors (R. 205) with the Unions electing twelve (12) directors and the Contractor associations electing twelve (12) (R. 204).

By stipulation, a supplemental complaint was filed by adding a second cause of action for declaratory relief seeking to hold invalid the trust which had evolved since the filing of the original complaint with the establishment of the Industry Promotion Fund.

The Respondents contended that, since the trusts and the Industry Promotion Corporation were jointly administered by appointees of labor and management, payments by employers to the trusts or the Industry Promotion Corporation constitute payments to a "representative of employees" as proscribed by Section 302. The Respondents further contended that the payments to any jointly administered fund is legal and permissible only if payments are for those purposes specifically enumerated in subsections (5) and (6) of Section 302. Petitioners contended that neither the former payments to the Trust nor the present payments to the Industry Promotion Corporation were proscribed by Section 302 because neither is a "representative of employees".

The District Court, ruling in favor of the Respondents' contention, held that the only purposes for which joint administrative committees or representatives of employers and unions could act were those coming within the exceptions in subsection (c) of Section 302 (App. A, p. 9A). The District Court did not reach the question of whether the Trust, or the non-profit corporation, was a "representative of employees" within the meaning of Section 302.

The United States Court of Appeals for the Ninth Circuit, in affirming, adopted with approval the reasoning and the basic ground of the District Court's decision that Congress intended to limit the type of funds which could be jointly administered. Further, the Court held that, assuming arguendo that the Trusts were moot, the non-profit corporation was a labor organization and, accordingly, a "representative of employees" within the meaning of Section 302 (App. B., p. 253).

REASONS FOR GRANTING THE WRIT

1. The question presented herein is of great importance to the administration of the Federal Labor Relations Laws for the instant decision by the Ninth Circuit Court of Appeals undermines the National Labor Policy which encourages labor-management cooperation in solving mutual industry problems.

The Ninth Circuit specifically stated that there was not the slightest hint in the record that any of the Joint Trust Funds involved in the instant case resulted in bribes, kick-backs, slush funds, racketeering, or union war chests. (App. B, p. 245) There was no evidence that the Joint Funds involved improper practices, which were actually, or even potentially, harmful to honest labor relations, or in any way inimical to the public welfare (R. 109, 111, 194). In addition, the Court recognized the laudable purpose of promotional funds and that it was vital to the economic position of both labor and management (App. A, p. 70A; App. B, p. 254, *infra*). Yet the result reached by the Court below definitely holds that all jointly controlled labor management trust funds, not falling within the exceptions provided by Section 302(c)(5) and (6), are deemed illegal *per se* regardless of their purpose.

Such a result subverts and undermines the National Labor Policy of fostering and developing joint action by labor and management to resolve mutual industry problems. To effectuate such a policy, both Congress and the Executive branch have taken steps to encourage the development of voluntary private machinery for resolving mutual industry problems.

Pursuant to congressional declarations,[2] joint dispute settlement boards, financed by trust funds, have been established in the last decade for conciliation, mediation and arbitration of labor disputes. Private joint apprenticeship training programs, also financed through jointly-administered funds, have been established as the result of apprenticeship training legislation.[3] The railroad industry has for years pursued a policy of "self-adjustment of the industry's labor problems between carrier organizations and effective labor organizations under the Railroad Labor Act of 1926."[4] Because of Section 10(k) of the Taft-Hartley Act, jurisdictional disputes in the construction industry are settled by a joint labor-management board.[5]

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[2] Congress declared in Section 201 of Title II of the Labor-Management Relations Act as amended (29 U.S.C. § 171) it to be a "policy of the United States" for labor and management ". . . to settle their differences by . . . such method as may be provided for in any applicable agreement for the settlement of disputes." Section 203 of the same Title of the Act (29 U.S.C. § 173(d)) similarly states that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for the settlement of grievance dispute."

[3] See Public Law 308, 75th Cong., 50 Stat. 664-665, 29 U.S.C. Sections 50-50(b).

[4] See *International Assoc. of Machinists, et al.* v. *S. B. Street*, 367 U.S. 740, 758 (1961).

[5] Section 10(k) of the Labor-Management Relations Act, as amended (29 U.S.C. § 165) provides for the elimination of a National Labor Relations Board determination where "the parties have agreed upon a voluntary method for the voluntary adjustment of the dispute, and the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry was established by the Building and Construction Trades Department of the AFL and Contractors Association as a private method for resolving jurisdictional disputes. See Kuhn "*Recent Jurisdictional Developments in Organized Labor*" in New Dimensions and Collective Bargaining (Davey, Kaltenborn, Ruttenberg Industrial Research Associations, Publication No. 21 (1959), page 6).

An Executive Order, resolving disputes at missile and space sites, is similarly based upon joint cooperative efforts by labor and management.[6]

The Industry Promotion Corporation involved in the instant case, which the Court below found was of vital economic importance to labor and management, is just one example in a particular industry of the joint cooperative efforts by management and labor that exist in countless industries throughout the United States and effectuate the National Labor Policy of private resolution of mutual industry problems. Although the growing trend in labor-management relations toward the development of bi-partite boards or committees, as a means of promoting industrial peace and cooperation, has resulted in the establishment of numerous joint organizations, similar to the promotional fund in the instant case, the decision of the Ninth Circuit holds all such joint programs invalid where financed in part by employer contributions. To deprive such programs of financing means, in many cases, their destruction.

The decision of the Ninth Circuit in the instant case, therefore, is restrictive of the national policy to further cooperative dealings between representatives of labor and management on improving their mutual interests in the larger community. It is premised on a construction of Section 302 which does not even further the aims of the Labor-Management Relations Act. The questions presented herein are extremely significant to a great number of employers and labor unions throughout the United States already participating in joint industry boards, joint trade committees, joint industrial safety plans, dispute settlement boards, and the like, and to the numerous individuals who serve as trustees of the trust funds created to administer these programs. The importance of securing a determination by this Court of the questions raised is underscored by the fact that any employer, who makes a payment found to be prohibited by Section 302, and any "representative of any employees" who receives or accepts any such payment, or agrees to do so, is subject under the Act to criminal penalties (Section 302(d)), as well as injunctive restraint (Section 302(e)).

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[6] Executive Order 10946 of May 26, 1961, entitled "Establishing a Program for Resolving Labor Disputes at Missile and Space Sites."

2. The instant decision of the Ninth Circuit Court of Appeals was erroneous in finding that the Industry Promotion Corporation violated Section 302 for the reasons that the Industry Promotion Corporation was not a "representative of employees," and the failure of Congress to specifically exclude such joint promotional funds did not imply that Section 302 prohibited their existence.

(a) The Industry Promotion Corporation Was Not a "Representative of Employees."

The legislative history of Section 302 shows that Congress had in mind a four-fold purpose in enacting Section 302, (1) to prevent the payment of bribes by an employer to representatives of his employees; (2) to prevent extortion or shakedowns by employers of such representatives; (3) to protect the interests of the beneficiaries of welfare funds; and (4) to prevent the welfare funds from being turned into "war chests" by the unions.[7]

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[7] See legislative history, as reviewed in *United Marine Division* v. *Essex Transportation Co.*, 216 F. 2d 410 at 411 (3rd Cir., 1954); District Court Opinion in *Employing Plasterers Association of Chicago* v. *Journeymen Plasterers Protective and Benevolent*

Neither the wording nor the legislative history of the Act indicate a congressional intent that payments to jointly administered boards be held invalid, *per se*. Despite the fact that the legislative history indicates that Congress was not concerned with all jointly administered funds, and the usual devices utilitized by labor and management to peacefully settle and resolve their differences were not included within the evils that Congress was attempting to correct,[8] the Court below, in attempting to ascertain the scope of the term "representative" places great emphasis on this Court's decision in *United States* v. *Ryan*, 350 U.S. 297 (1956). Petitioners' view of the *Ryan* case is that this Court did not hold that every union appointee was a "representative." On the contrary, this Court in the *Ryan* decision made it plain that in using the term "representative" Congress intended that it include "any person authorized by employees *to act for them in dealing with* their employers." (Emphasis supplied). Thus, the union officer or apointee must be performing a function that relates to the employement relationship. In the instant case, the union-appointed directors to the Industry Promotion Corporation, once appointed, do not act for employees *in dealing with* their employers, nor do they act for employees (R. 184, 186).

Society of Chicago, 177 F. Supp. 688 at 692-693 (N.D. Ill., E.D., 1959); rev'd in part 279 F. 2d 92 (7th Cir., 1960); *William Dunbar Co.* v. *Painters and Glaziers District Council*, 129 F. Supp. 417 at 424 (D.C. D.C., 1955); *United States* v. *Lippi*, 190 F. Supp. 604 at 617 (D.C. Del., 1961); *Shapiro* v. *Rosenbaum*, 171 F. Supp. 875; *United States* v. *Annunziato*, 293 F. 2d 373 at 379 (2nd Cir., 1961); *United States* v. *Alaimo*, 191 F. Supp. 625 (M.D., Penn., 1961).

[8] Consider the statements of Senators Ball, Byrd, Pepper, 92 Cong. Record, 4898, 4895, 4900, 5425.

Petitioners' view of the *Ryan* case is the only view that is consistent with the definition of "representative of employees" in the statute. The only payments by employees, proscribed by Section 302 of the Act, are payments to a "representative of employees." "Representative" is defined in 29 U.S.C. 152(4) as including "any individual or labor organization." The Ninth Circuit held that the Industry Promotion Corporation was a labor organization within the following definition in 29 U.S.C. 152(5):

> "(5) The terms 'labor organization' means
>
> "Any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Thus, under the above definition, the only organizations that are "labor organizations" are organizations that exist for the purpose of dealing with employers concerning matters that arise out of and relate to the employment relationship. Since the Industry Promotion Corporation, in the instant case, existed solely for the purpose of carrying out a program of public relations for the general welfare and advancement of the plastering industry, the Court below erroneously concluded that such a promotional program can be considered as arising out of and relating to the employment relationship.

Decisions of the National Labor Relations Board support Petitioners' view. Relying on this Court's decision in *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349

(1958), the Board, in holding a promotional program was not a mandatory subject of collective bargaining, stated that a promotional program is not within the scope of the terms "wages, hours and other terms and conditions of employment," and ". . . that an industry promotional fund, seems to us to be outside of the employment relationship. It concerns itself rather with the relationship of employers to one another or, like advertising, with the relationship of an employer to the consuming public." *Detroit Resilient Floor Decorators Local No. 2265 of the United Brotherhood of Carpenters and Joiners of America, et al.*, 136 NLRB No. 76 (decided March 30, 1962); *McCloskey, et al.*, 50 LRRM 1430. Similarly, the Industry Promotion Corporation, in the instant case, is outside of the employment relationship, and hence, is not a "representative of employees."

The error of the Court below is attributable, in part, to the failure of the Court to distinguish between an industry promotion corporation, which is outside the employment relationship, and performed none of the functions of a labor organization and a joint fund which engages in collective bargaining functions and performs, in part, the functions of a labor organization. Judge Skelly Wright in *Southern Louisiana Chapter, Inc.* v. *Local Union 130*, 171 F. Supp. 432 (E.D. La. 1959), in holding that a joint apprenticeship training fund was not a representative of employees, gave recognition to this important distinction.[9]

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[9] Judge Wright distinguished the Ninth Circuit's decisions in *Sheet Metal Contractors Assn.* v. *Sheet Metal Workers International Assn.*, 248 F. 2d 307 (9th Cir., 1957); cert. denied 355 U.S. 924 (1958), and *Conditioned Air and Refrigeration Co., et al.* v. *Plumbing and Pipe Fitting Labor-Management Relations Trust*, 159 F. Supp. 887 (D.C. Cal. 1956), aff'd. 253 F. 2d 427 (9th

In sum, the Court below, in erroneously concluding that the Industry Promotion Corporation was a "representative of employees" misapplied this Court's decision in *Ryan* and misinterpreted the Statute.

(b) Failure of Congress to Specifically Exclude Such Joint Promotional Funds Did Not Imply That Section 302 Prohibits Their Existence.

The Ninth Circuit held that since joint promotional funds were not specifically excepted in Section 302(c), all joint funds except those specifically permitted, are unlawful. The Court held that Congress did intend to limit the type of funds which could be jointly administered.

The purposes for which Congress enacted Section 302 are set forth above (p. 10, *infra*). The legislative history clearly establishes the evils Congress intended to outlaw. There is no allegation in the instant case that the joint fund fell within any of these objectives.

The Court below relied upon the failure of Congress to include joint funds within the permissible exceptions of Section 302(c). To conclude that Section 302 prohibited all jointly administered trust funds, except those specifically excepted in subsection (c) of Section 302 is erroneous. It is a general rule of construction that the function of an exception is to exempt something which would otherwise be within the scope of the

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Cir., 1958), and the Third Circuit decision in *Mechanical Contractors Assn. of Philadelphia, Inc.* v. *Local Union 420, et al.*, 265 F.2d 607 (3rd Cir., 1959), on the ground that the joint boards, to which employers contributed in those cases, were engaged in bargaining functions for the employees, and, accordingly, the courts held that such boards were labor organizations and, therefore, "representatives of employees" within the meaning of Section 302 of the Act.

general words of the statute. It cannot be used, as was done by the Court below to define the offense by saying that anything not excepted is *ipso facto* prohibited regardless of whether it meets the statutory standard of the prohibited activity. See *Kane* v. *Shulton, Inc.*, 189 F. Supp. 882, 884 (D.C. N.J., 1960); Crawford Construction of Statutes, 609-610 (1940) A reading of the entire Section 302 makes it clear that the permissible exceptions in 302(c) apply only to payments that have already been proscribed by subsections (a) and (b). Thus, if a joint promotional fund, such as is involved here, does not fall within the prohibition of Section 302(a), then the exceptions of Section 302(c) are in no way applicable.

What the Court below has done is to read into the permissible exceptions of Section 302(c) a prohibition. The Court has said, in interpreting what is actually a criminal statute, that unless a joint fund is specifically permitted by a specific exception in Section 302(c), it is prohibited. Such a reading is contrary to the basic principle that penal statutes are to be strictly construed. *United States* v. *Resnick*, 299 U.S. 207, 209 (1936); *F.C.C.* v. *American Broadcasting Co.*, 347 U.S. 286, 296 (1954). In fact, this Court has adopted this approach in construing Section 302. *Arroyo* v. *United States*, 359 U.S. 419 (1959). There this Court held that where an act was not specifically declared by Section 302 to be a crime, the statute could not be construed to make it so.

The same analysis applies to the reasoning adopted by the Court of Appeals for the Ninth Circuit. The Court held that what the Act did not specifically permit, must be a crime. Yet this Court has specifically condemned such reasoning in *Arroyo*.

There is no basis for reading into Section 302 the proscription upon a type of fund which Congress did not specifically prohibit. Particularly is this so when the type of fund accords with the legislative and effective policies in the labor-management field.

We submit that this case is of substantial public importance sufficient to justify its review by this Court. We believe that the interests of thousands of employers and employer associations all over the United States, in every trade and industry, may be adversely affected by the interpretation of the Court below. The fulfillment of our National Labor Policy is impeded by the restrictive reading of Section 302 adopted by the Court of Appeals for the Ninth Circuit. We believe that the issues which we have raised herein present matters of sufficient public importance so as to justify an interpretation by this Court of Section 302 in its application to joint industry funds that have a beneficial and salutary effect upon many industries in the United States.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 463-60-Y

Paramount Plastering, Inc., a corporation, et al.,
Plaintiffs,

v.

Local No. 2 of the Operative Plasterers and Cement Masons International Association, an unincorporated voluntary association, et al.,
Defendants.

Opinion

Yankwich, District Judge:

* * * * * * * * * *

A complaint was filed on April 19, 1960 seeking an injunction under the provisions of §302 of the Labor Management Relations Act. (29 U.S.C.A., §186.)

I

The Pleadings, Issues and Proof

The plaintiffs are employers who have signed collective bargaining agreements with the defendant unions. In the complaint reference is made to the specific provisions of the collective bargaining agreements under which three trusts were to be created. Each of the trust agreements and the collective bargaining agreements require the employers to contribute a certain sum per hour for each hour worked by an employee. Each trust specifies that there shall be an equal number of employer-designated trustees and an equal number of employee-designated trustees who shall be appointed by the union.

Under one provision of the Plastering Institute Trust, the trustees, after making provision for the administration of the trust, are to pay the monies over "to the proper Trust or program as provided for in the labor agreement".

There is no requirement in either the collective bargaining agreement or the trust agreement which specifies that the monies are to be spent in connection with medical and surgical benefits or for pensions within the requirements of § 302(c)(5) of the Labor Management Relations Act. (29 U.S.C.A., §186(c)(5).)

The Southern California Plastering Institute Industry Program Trust is not a medical and surgical benefit trust or a trust for providing pensions. The purpose of the trust is to carry on "a program of public relations for the general welfare and advancement of the plastering industry, * * *" and "for the purpose of improvement of business conditions of the lathing and plastering industry, * * *".

The purpose of the Labor Management Relations Trust is not that of a pension or a medical and surgical benefit trust. Its purpose is "for the common interest of labor-management relations of the parties * * *."

The complaint alleges that all of the trust agreements are invalid and in violation of the terms of §302 of the Labor Management Relations Act in that they provide for payments by employers. It is also alleged that none of these monies are used or applied for any of the purposes which are permitted under Subsection (c) of §302.

On March 13, 1961, the plaintiffs were granted leave to file supplemental complaint, the chief object of which was to bring before the court the fact that since the institution of the action the functions of the three trusts had been transferred to the trustee of a California non-profit corporation, the Southern California Plastering Institute, Inc., organized on February 10, 1961. By the supplemental complaint a second cause of action for declaratory relief was added seeking a declaration that the new trust was invalid, (28 U.S.C.A., §§2201-2202) and "that the creation of such defendant non-profit corporation, and the substitution of it in place of the three above mentioned Trusts, does not entitle such non-profit corporation to collect monies from employers, but that such defendant is as fully a representative of employees within the meaning of said Section 302 as were the three Trusts hereinabove mentioned, in that such non-profit defendant corporation is managed, dominated and controlled by directors, not less than half of whom are representatives and agents of the defendant unions who represent the employees of plaintiffs, and the other plastering contractors in the geographical jurisdiction of the defendant unions." The supplemental complaint also alleged, upon information and belief, "that it is the intent and purpose of the defendants herein to have the said non-profit defendant corporation to act as trustee in the collection and disbursement of monies from employers in lieu and in place of the three trust last hereinabove mentioned, without qualifying to act as a trust company under the laws of the State of California to do business as a trustee or as a trust company."

According to the allegations of the supplemental complaint, and as appears clearly from their wording, the articles of incorporation did not designate the members of the corporation but the By-laws, adopted on February 13, 1961, designated eight locals of various unions and two corporations representing employers as members. The voting rights of the members are divided as follows: Local 2 of the Operative Plasters & Cement Masons International Association, A.F.L., 3 directors; Local 194 of the same union, 1 director; Local 400, 1 director; Local 489, 2 directors; Local 343, 1 director; Local 739, 2 directors; Local 838, 1 director; Local 42 of Wood, Wire and Metal

Lathers International Union, A.F.L., 1 director; Contracting Plasterers Association of Southern California, 11 directors; Lathing and Metal Furring Contractors Association of California, Inc., 1 director.)

This fact is made the subject of an allegation in the complaint that "under Section 7 of Article III of the By-laws of the number of votes which each member has for the election of directors are set forth, and the defendant unions are given sufficient votes to elect at least half of the directors of such corporation." The allegations showing the existence of a controversy are in these words: "That there is a dispute and controversy existing between plaintiffs, on the one hand, and the defendants, on the other hand, in that plaintiffs are claiming that defendant Southern California Plastering Institute, Inc. is an employee representative within the meaning of Section 302 of the Labor-Management Relations Act, and is prohibited from collecting or receiving monies from employers by the provisions of that section, and further, in that such defendant is acting as a trustee and trust company without being qualified or authorized under the laws of the State of California, to be a trustee or to act as such trustee. That the defendants herein dispute all of the said contentions of plaintiff as described herein.

"That unless the defendants are restrained and enjoined from collecting monies from plaintiffs for the purposes described in the said collective bargaining agreement and the said three trust agreements. said defendants will continue to collect such monies from plaintiffs and other employers engaged in the plastering industry within the geographical jurisdiction of the defendant unions for such purposes and trusts."

The answers of the defendants to the complaint and the supplemental complaint admitted the main facts, the existence of the original trust agreements and the assumption of its functions by the corporation in the collective bargaining agreement between the employers and the unions. The denials related merely to the validity and legality of the transaction. The answers to the supplemental complaint asserted that "the Southern California Plastering Institute, Inc. was incorporated for the purposes set forth in said Articles of Incorporation and for the further purpose of creating an entity whose acts, conduct and operations would not lie within the proscriptions of any of the sections of the Labor-Management Relations Act." Also that the original defendants: "are not now collecting monies from plaintiffs or other contractors; that the defendant Southern California Plastering, Inc. is the only defendant now authorized to collect money from plaintiffs or other contractors."

No oral testimony was received except some testimony relating to the fact that plaintiff contractors bought plasterboard which was manufactured in Nevada and hardwall plaster containing gypsum which originated in interstate commerce in quantities sufficient to satisfy the minimal requirement of the statute that the employees were "employed in an industry affecting commerce". (29 U.S.C.A., §186(a)(1) and (2).)

While the summaries of the books of the plaintiff contractors relating to work and materials were carefully scrutinized by the defendants, no argument is advanced that the minimal requirement has not been met. None could very well be made. For, the undisputed testimony as to one company, was that it purchased, from sources outside the State, plasterboard and hardwall plaster of the total value of $158,589.28 during the calendar year 1960-1961. During 1959-1960 the same concern performed a lathing and plastering contract at Nellis Air Force Base, Nevada, at a total contract price of $255,280.00, all materials for the job being purchased from sources outside California.

One of the other plaintiffs purchased, in 1960, sacks of hardwall plaster of the value of $50,828.93, and from January 1, 1961 to April 30, 1961, $6,795.07. The same plaintiff purchased, for 1960, plasterboard in the amount of $16,393.85 and for the corresponding four months in 1961 $2,249.09.

Other plaintiffs purchased out of state materials for the past twelve months in the sum of $175,000.00.

In some instances the orders were placed through local material houses, in others, directly through the supplier. In many instances the shipment was made direct from the outside supplier, and delivery being made in carload lots on a spur track on the job, or small quantities at the job or at the plaster contractors warehouse. As the equipment and material and, perhaps the employees also moved in interstate commerce, it cannot be seriously contended that interstate commerce was not involved. (See, 29 U.S.C.A., §152(6); National Labor Relations Board v. Fainblatt, 1939, 306 U.S. 601, 604-605; National Labor Relations Board v. Cantrall, 9 Cir., 1953, 201 F. 2d 853, 855; National Labor Relations Board v. Stoller, 9 Cir., 1953, 207 F. 2d 305, 306-308; National Labor Relations Board v. Daboll, 9 Cir., 1954, 216 F. 2d 143, 144; Bianchi v. United States, 8 Cir., 1955, 219 F. 2d 182, 190-191.)

The corporation was organized, as the Articles of Incorporation state, as a general non-profit corporation under the non-profit corporation law of the State of California. (California Corporation Code, §§9000 et seq.)

The objects stated in the Articles of Incorporation were these:

(a) To promote industry betterment and industry public relations for the lathing and plastering industry.

(b) To encourage harmony between labor and management within the lathing and plastering industry.

(c) To carry out appropriate programs of public relations for the general welfare and advancement of the lathing and plastering industry.

(d) To gather and distribute facts, data and other information relative to the use and benefits of the lathe and plaster in general for the use and benefit of its members, the lathing and plastering industry as a whole and for public dissemination.

(e) To engage generally in any causes or objects similar to the foregoing in order to promote the lathing and plastering industry.

(f) To adopt By-laws prescribing the duties of the officers and agents of the corporation, the detail of its organization, the time and manner of its meetings, and any and all detail incident to its meetings and conduct and management of its organization.

(g) To do any and all things which a natural person may do necessary or desirable for the general purpose for which the corporation is organized.

These objects are well within the purposes authorized by California law for non-profit corporations. (California Corporation Code, §9200. See, Complete Service Bureau v. San Diego County Medical Society, 1954, 43 C. 2d 201, 207-208; Griffiths & Sprague Stevedoring Co., Inc. v. Waterfront Employers Ass'n. of Pacific Coast, 9 Cir., 1947, 162 F. 2d 1017.)

The corporation having a de facto existence, its legal existence can only be inquired into by the State of California in relation to its Attorney General, in a quo warranto proceeding or under the special California statute which has taken its place. (California Corporation Code, § 4690; Madera Railway Co. v. Raymond Granite Co., 1906, 3 C. A. 668, 679-680; McCann v. Children's Home Society of California, 1917, 176 C. 359, 363; The People v. Merchants Protective Corp., 1922, 189 C. 531, 533-536; Westlake Park Investment Co. v. Jordan, 1926, 198 C. 609, 618; Collins v. Consolidated Water Co. of Pomona, 1932, 122 C. A. 348, 349.) And if, as contended, its operations contravene the provisions of California law in that it is engaging in the trust business without authorization for such activity in its Articles of Incorporation (California Financial Code, §1500) and without authority from the Superintendent of Banks (Califorina Financial Code, §§381, 382) and without deposit of securities with the State Treasurer (California Financial Code, §§1540-1547), the State is the only power that can intervene to determine the truth of these allegations and take appropriate action, either by quo warranto or other authorized proceedings. (California Financial Code, §§3111-3132.) We cannot usurp that State function under the guise of a declaration of rights.

So we come to the main question, whether the original trusts and the corporation which succeeded them perform functions which are forbidden by the Labor Management Relations Act, as amended in 1959.

II

Restriction of Purposes

A determination of the question before us requires that we inquire into the scope of the clause, the violation of which is charged here. The clause is an exception to the general provisions of the section, the aim of which is to proscribe the payment by employers and receipt by employee representatives in industries affecting commerce of bribes, gifts and gratuities, and to control monies paid into union trust funds as "war chests" or for other purposes.

After the adoption of the statute (Taft-Hartley) so many variant interpretations, allegedly drawn from its history, were asserted that Judge Learned Hand in a dissent in a noted case, United States v. Ryan, 2 Cir., 1955, 225 F. 2d 417, complained that he found "it impossible to extract any safe principles". (p. 427.) The Supreme Court granted certiorari in that case and its decision has become the guide to the meaning of the section. Especially insofar as it relates to the prohibition against payment to "representatives" of the union. The entire clause as it stood before the 1959 amendment is printed in the margin.[1]

The important part of the Ryan decision, so far as it concerns this case, is contained in the following statement as to the scope of the exceptions: "Nor can it be contended that in this legislation Congress was aiming solely at the welfare fund problem. Such a suggestion is supported neither by the legislative history nor the structure of the section. The arrangement of § 302 is such that the only reference to welfare funds is contained in § 302(c)(5). If Congress intended to deal with that problem alone, it could have done so directly, without writing a broad prohibition in subsection (a) and (b) and *five specific exceptions thereto in subsection (c), only the last of which covers welfare funds.* As the statute reads, it appears to be a criminal provision, malum prohibitum, which outlaws all payments, with stated exceptions, between employer and representative." (United States v. Ryan, supra p. 305.) (Emphasis added.)

As I read this extract it means just this, that subsection 5 is a declaration of the Congress that only welfare funds *coming within one of the five (now six) exceptions* are exempt from the sweep of congressional condemnation. Subsequent decisions of the Supreme Court confirm this view.

In National Labor Relations Board v. Cabot Carbon Co., 1959, 360 U.S. 203, the high court upheld the ruling of the National Labor Relations Board to the effect that a "committee" of employees which deal with employers was forbidden by the Act, despite the insistence that "to hold these employee committees to be labor organizations would *prevent employers and employees from discussing matters of mutual interest concerning the employment relationship.*" (p. 218.) (Emphasis added.) To this the Court answered: "The principal distinction lies in the unfettered power of the former to insist upon its requests. Labor Board v. Jas. H. Matthews & Co., 1156 F. 2d 706, 708. Whether those proposals and requests by the Committees, and respondents' consideration of and action upon them, do or do not constitute 'the usual concept of collective bargaining' (256 F. 2d at 285), we think that those activities establish that the Committees were 'dealing with' respondents, with respect to those subjects, within the meaning of §2 (5)." (p. 214.)

In Arroyo v. United States, 1959, 359 U. S. 419, the majority of the court held that in enacting the section the Congress were concerned with corruption of collective bargaining through bribery of employees representatives by employers and "with the possible abuse by union officers of the power which they might achieve *if welfare funds were left to their sole control.*" (p. 426.) (Emphasis added.)

I take these statements to mean that the *only* purposes for which joint administrative committees of employers and employees, *working within the framework of the Labor Management Relations Act,* could act were those coming within the exceptions. This interpretation is confirmed by the added statement contained in the opinion: "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. See 92 Cong. Rec. 4892-4894, 4899, 5181, 5345-5346; S. Rep. No. 105, 80th Cong., 1st Sess., at 52; 93 Cong. Rec. 4678, 4746-4747. To remove these dangers, specific standards were established to assure *that welfare funds would be established only for purposes which Congress considered proper* and expended only for the purposes for which they were established. See Cox, Some Aspects of the Labor-Management Relations Act, 1947, 61 Harv. L. Rev, 274, 290. *Continuing compliance with these standards in the administration of welfare funds was made explicitly enforceable in federal district courts by civil proceedings under § 302(e).*" (pp. 426-427.) (Emphasis added.)[3]

The conclusion is reenforced by the statement in a later case, Lewis v. Benedict Coal Corp., 1960, 361 U.S. 459, which reads: "The provisions of the collective bargaining agreement creating the fund included the express provision that 'this Fund is an irrevocable trust created pursuant to Section 302(c) of the "Labor-Management Relations Act, 1947.'" Another provision specifies that the purposes of the fund shall be all purposes '*provided for or permitted in Section 302(c).*' In this way the agreement plainly declares what the statute requires, namely, that the fund shall be used 'for the sole and exclusive benefit' of the employees, their families and dependents." (pp. 464-465.)

All cases interpreting this clause which have arisen since the decision in Ryan, supra, must be read in the light of its declarations and those contained in subsequent cases as to the scope of the limitations on the nature of trust funds. So read they warrant the conclusion that *the only* trust funds permitted are those in the six categories now contained within the exceptions.

In the light of this, the contention of the defendants that the clause under discussion does not prohibit joint administration of trust funds, if they are established for other purposes than dealing with the employers "concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work", (29 U.S.C.A. § 152 (5)) cannot be sustained.

Two cases in the Ninth Circuit, Conditioned Air & Refrigeration Co. v. Plumbing and Pipe Fitting Labor-Management Relations Trusts, D.C. Cal., 1956, 159 F. Supp. 887, affirmed in 253 F. 2d 427, and Sheet Metal Contractors Association of San Francisco v. Sheet Metal Workers International Association, 9 Cir., 1957, 248 F. 2d 307, took cognizance of the decision in Ryan, supra, and applied to the facts before them the broad interpretation of the word "representative". Because the trusts before them palpably concerned themselves with the grievances and other purely union activities defined in 29 U.S.C.A., § 152(5) and which are specifically forbidden by Section 302 of the Act (29 U.S.C.A., § 186) the courts in those cases did not reach the question before us. They merely held that a particular joint agreement did not come within any of the exceptions stated in subdivision (c) of § 302. To particularize:

In Sheet Metal Contractors Association of San Francisco v. Sheet Metal Workers International Association, supra, the Court said: "None of the provisions of the joint agreement were such as to bring the payments made to the Joint Industry Board *within any of the exceptions* stated in subdivision (c) of § 302, *the most important* of which permits money to be paid to a trust fund for the exclusive benefit of the employees where such payments are held in trust for the purpose of paying for medical or hospital care, pensions on retirement or death, or compensation for injuries, or illness resulting from occupational activity." (p. 312.) (Emphasis added.) Similarly, Judge Gilbert H. Jertberg, of our court, in Conditioned Air & Refrigeration Co. v. Plumbing and Pipe Fitting Labor Management Relations Trust, supra, came to the conclusion that the chief object was to advance aims which *were not* within the exception: "The only specific purposes of the Trust are to enforce the collective bargaining agreement and the provisions thereof, covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United

States and Canada, and to protect the *wages, rates of pay, hours of labor and other conditions of employment of the employees in the plumbing and pipe-fitting industry.* The other stated purposes are vague and uncertain." (p. 899.) (Emphasis added.)

If the teachings of these cases were contrary to the decision of the Supreme Court in Ryan and the subsequent cases which have been alluded to, we would be bound to disregard them. But we are not confronted with that situation. For these cases *did not deal with the problem* which concerns us, namely, whether purposes for which jointly administered trust funds may be organized *are limited* to those contained in the exceptions to the section we are considering. To us it is plain that *they are so limited.*

Some very recent cases decided in the Courts of Appeals interpret the cited Supreme Court decisions on the subject as we do. In Copra v. Suro, 1 Cir., 1956, 236 F. 2d 107, we find the following statement as to the scope of the exception clause: "Subsection (c) provides *five exceptions,* the last of which is for money paid to a welfare trust fund for the exclusive benefit of employees and their families (including a joint fund for the employees of several employers), provided that the trust fund meets certain tests." (p. 113.) (Emphasis added.)

In Employing Plasterers' Association of Chicago v. Journeymen Plasterers' Protective and Benevolent Society of Chicago, 7 Cir., 1960, 279 F. 2d 92, we find the following as to the scope of the clause: "Section 302 is aimed *primarily at the prevention of possible abuse* and not at providing a remedy for abuse actually perpetrated. To that end the section declares that the payment and acceptance of employer contributions to employee welfare funds between employers and 'representatives' of employees, respectively, shall be unlawful *unless certain safeguards* are observed in the administration of the welfare funds. Section 302(e) provides the civil remedy of injunction to restrain violations of the section; that is, to restrain payment or acceptance of employer contributions to welfare funds that do not meet the statutory safeguards in their administration. Where it is established that payment and acceptance is between employer and 'representatives' of employees, *the issue in a suit for injunction becomes the legality of the welfare funds as measured by the statutory standards of administration.*" (p. 97.) (Emphasis added.)

In Mechanical Contractors Association of Philadelphia v. Local Union 420, 3 Cir., 1959, 265 F. 2d 607, it was contended, *as it is contended here,* that "it is not the mere fact of joint administration which runs afoul of Section 302 but the character of the functions performed by the joint administrators." (p. 611.) Rejecting this contention the Court said: "In light of the Ryan case, strained interpretations intended to limit the Act's operations are to be avoided. Thus, the essence of Section 302 may be summarized as follows: No fund derived from employer contributions may be administered by persons designated by a union *unless the fund meets the standards set forth in Section 302*(c)(*5*). *Any employee-designee administering such fund not meeting the requirements of Section 302*(*c*)(*5*) *is a 'representative' within the meaning of Subsections 302*(*a*) *and* (*b*). As was stated in United States v. Ryan, 350 U. S. at page 305, 76 S. Ct. at page 404, 'if "representative" means only the "exclusive bargaining representative," the explicit limitations on welfare funds in § 302(c)(5) may be easily evaded. Payments made directly to union officials, *or to other individuals as trustees,* would apparently be excluded from § 302. Thus, a narrow construction would frustrate the primary intent of Congress.' (Emphasis supplied.) Careful reading of the Sheet Metal and Conditioned Air cases convinces us that rather than supporting appellant's thesis, they are in substantial accord with the principle set forth herein. Further support for this proposition is contained in our earlier case of United Marine Division, ILA, Local 333, A. F. L. v. Essex Transportation

Co., 3 Cir., 1954, 216 F. 2d 412, where we held that 'They [the Congress] were forbidding money to be paid to representatives of unions unless *through a trust fund, the requirements for which were set up in some detail* [*i.e., under* §*302(c)(5)*].' This conclusion we feel is inescapable from the structure and wording of the section. As was stated by Judge Hand in his dissenting opinion in United States v. Ryan, 2 Cir., 1955, 225 F. 2d 417, 425, subsequently adopted by the Supreme Court, '*Since* * * * *the purpose of subsection* (*c*) *is to state exceptions to the preceding subsections* (*a*) and (*b*), *the payments that subsection* (*c*) *covers would fall within* (*a*) *and* (*b*) *except for the exception.*'" (p. 611.) (Emphasis added.)

This interpretation is aided by the fact that the Congress, in 1959, (73 Stats. 573) added a new category to the exceptions, reading: "(6) with respect to money or other things of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso of clause (5) of this subsection shall apply to such trust funds." (29 U.S.C.A., § 186(c)(6).)

Certainly the matter of apprenticeship, vacations, holidays and the like covered by this proviso were not so clearly related to the proscribed practices so as to require a specific enactment of the Congress exempting them. And yet, because certain courts had held that trust funds for apprenticeship purposes were forbidden, the Congress acted and, for good measure, added other exempt categories. Under this enactment injunctive relief was refused against a trust agreement between an employers' association and a union establishing a joint fund for the training of apprentices and the improvement of the skills of journeymen, supported by the contributions of the employer members. (South Louisiana Chapter, Inc. v. Local Union No. 130 of the

International Brotherhood of Electrical Workers, E.D. La., 1959, 177 F. Supp. 432.) So doing the court defined the scope of Section 302, as amended, in this manner: "The legislative history of Section 302 makes clear that Congress had in mind, in addition to the protection of welfare funds, outlawing payment of bribes by management to representatives of employees, and extortion of employers by such representatives. See 93 Cong. Rec. 3562-3566, 4746-4748. See also 10 Stanford L. Rev. 374. In seeking to apply the language of Section 302 literally, this legislative purpose was disregarded in the cases on which plaintiff relies, particularly in Mechanical Contractors, supra. Congress, therefore has been required to spell out its intent in order that courts will not strike down, as illegal, *labor and management-agreements, such as the one in suit, which promote harmony in an industry and redound to the benefit of the employer and employee alike.* Congress, in the Labor Management Reform Act of 1959, has now made clear what these cases have misconstrued in the Labor Management Relations Act of 1947. *Congress has now specifically exempted from the operation of Section 302 labor-management agreements which would set up a trust fund for the training of apprentices,* § 505, Labor Management Relations Act of 1959, 29 U.S.C.A., § 186(a-c)." (p. 437.) (Emphasis added.)[3]

That these decisions interpret correctly the purpose of § 302 and the exceptions, is evidenced by the following quotation from the House Report on the 1959 amendment to the Section: "The Committee bill contains an amendment to Section 302 of the Labor Management Relations Act, which makes it clear that defraying the costs of apprenticeship or other training programs *is a permissible object* of a joint trust fund to which an employer makes contribution.

"The original drafting of section 302 has created similar legal problems with respect to pooled vacation, holiday, severance, or similar benefits. The amendment of section

302 of the Labor Management Relations Act of 1947, as amended, as proposed in the committee bill would include *these items as permissible* objects of such joint trust funds." (House Report No. 741, 1959 U. S. Cong. and Adm. News, pp. 2445-2446.) (Emphasis added.)

In explaining the meaning of the 1959 amendments the Report justly stresses the fact that the Congress added more *"items as permissible objects of such joint trusts."*[4]

Perhaps Mr. Archibald Cox was right in saying of the restrictions imposed on trust funds: "The provisions dealing with employer contributions to union trust funds *set the employer up as watchdog, although it has no interest in the fund.* * * *

"The Taft-Hartley Act, however, is the first instance in which the legislative process has been used to settle in favor of one side or the other specific questions—such as the union ship and *trust fund issues*—which were theretofore left to collective bargaining and the play of economic forces." (Archibald Cox, Some Aspects of the Labor Management Relations Act, 1948, 61 Harv. L. Rev. 274, 314.)

The philosophy of the Wagner Act allowed unfettered interplay between management and labor. But the Congress, beginning with the Taft-Hartley Act and ending with the 1959 amendment to the Labor Management Relations Act, had a different approach. This they expressed by proscribing certain practices and permitting others in labor-management agreements, and *permitting joint trust funds for certain purposes only.*

Granted that representatives of labor and management could legally associate themselves in corporate entities for such purposes under state law, they must accept the federal restriction of these purposes, *if they seek to apply them to collective bargaining agreements,* which come under the exclusive jurisdiction of federal law.[5] Ours is the duty to apply them.

Judgment will therefore be for the plaintiff for declaration, limited to the grounds stated in this opinion, and injunction. However, because of the novelty of the problem and the irreparable damage which would be suffered by the defendants if they were forthwith deprived of the right to receive monies for the fund and further administer it, the court, in the exercise of its inherent power will stay execution and enforcement of the injunction until the judgment shall have become final, after appeal.[8]

Formal findings and judgment to be prepared by counsel for the plaintiffs under Local Rule 7.

Dated this 5th day of June, 1961.

/s/ Leon R. Yankwich
U. S. District Judge

Notes to Text

1. "(5) with respect to money or other thing of value paid to a trust fund established by such representative for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents); Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the

representatives of the employers and the representatives of employees may agree upon and in the event the employer and employees groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on the impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

2. The minority, while disagreeing with the disposition of the case, agree with the majority's characterization of the objectives of the section. See, Mr. Justice Tom Clark's opinion, Arroyo v. United States, supra pp. 432-433. Significantly, he quotes the following statement of the managers of the bill in the Senate: "'[U]nless we make sure that such [trust] funds, when they are established, *are really trust funds* . . . for the benefit of employees specified in the agreement, there is very grave danger that the funds will be used for the personal gain of union leaders . . .' 93 Cong. Rec. 4678." (p. 432.) This accords with the view of Mr. Archibald Cox which is referred to in the majority opinion. Speaking of the proscription imposed on trust funds and their origin, he wrote: "This provision proscribes multi-employer or industry-wide funds, such as those set up by the UMW and American Federation of Musicians. No one appears ever to have suggested that a properly admin-

istered industry-wide fund presents evils not found in funds confined to employer units. The ban was first proposed by southern congressmen in 1946 in the interest, if not at the request, of southern coal operators at a time when the UMW was seeking to establish an industry-wide health and welfare fund. Thus, a specific issue of the kind normally dealt with in collective bargaining was transferred into the legislative forum for the benefit of one of the opposing parties." (Op. Cit., p. 291.)

3. See, Minkoff v. Scranton Frocks, Inc., S.D. N.Y., 1960, 181 F. Supp. 542, affirmed, 279 F. 2d 115, where the scope of §302 is stated in this manner: "Section 302 makes it illegal for an employer to give money to any representative of his employees (subdivision a), and makes it illegal for any representative to receive any money from an employer (subdivision b). These provisions were aimed at preventing the creation of union slush funds and racketeering activities by a union or its representatives. See United States v. Ryan, 350 U.S. 299, 76 S. Ct. 400, 100 L. Ed. 335; 59 Columbia Law Rev. 96 (1959). However, *these prohibitions do not apply to any money paid to a trust fund for the benefit of employees, such as Health and Welfare Funds or Retirement Funds* (subdivision c(5)). In passing it should be pointed out that the section exempts from the taint of illegality payments made pursuant to an award of an arbitrator (subdivision c(2)), but such exemption cannot be conclusive against a showing that the award contemplates an act clearly within the prohibition of the statute." (pp. 547-548.) (Emphasis added.)

4. This was also the view of the managers of the bill in the Senate, as appears from their statement quoted in the minority opinion in Arroyo v. United States, supra, and in our Note 2.

5. The conclusion reached makes it unnecessary to consider the alleged differences between the voting and other powers of the directors of the corporation and those of the

trustees in the former trusts. These differences do not affect the purpose, *which we find to contravene the statute, when used to implement a collective bargaining agreement.* In this connection, the defendants' confident reliance on the statement of the Court of Appeals for the Third Circuit that because payment is made to a fund and the trustees "have fiduciary duties in connection therewith as to any other trustees" they "are not acting as representatives of either union or employers" (United Marine Division v. Essex Transportation Co., 9 Cir., 1954, 216 F. 2d 410, 412) is misplaced. The reasons are these: The opinion preceded Ryan. It is modified by that Court's later post-Ryan decision. (Mechanical Contractors Association of Philadelphia, Inc. v. Local Union 420, 3 Cir., 1959, 265 F. 2d 607, 611.) More, *it is disapproved,* by the Court of Appeals for the Ninth Circuit in Sheet Metal Contractors Association of San Francisco v. Sheet Metal Workers International Association, 9 Cir., 1957, 248 F. 2d 307, at p. 315.

6. See, Hovey v. McDonald, 1883, 109 U.S. 150, 161; Champlin Refining Co. v. Corporation Commission of Oklahoma, 1932, 286 U.S. 210, 239; Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky, 1933, 290 U.S. 264, 271; Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co., 1960, 363 U.S. 528, 531-532; Tulare Irrigation District v. Superior Court, 1925, 197 C. 649, 660-665; City of San Diego v. Southern California Telephone Corp., 1954, 42 C. 2d 110, 120.

[Endorsed]: Filed June 5, 1961.

Findings of Fact and Conclusions of Law and Judgment

The above-entitled action came on regularly for trial on Tuesday, May 23, 1961, before the Honorable Leon R. Yankwich, judge presiding, a jury trial having been expressly waived, plaintiffs above-named appearing by James A. McLaughlin, of the firm of McLaughlin & Casey, and by Earl Klein, their attorneys, defendants The Contracting

Plasterers' Association of Southern California, Inc., a corporation, C. A. Reischel, James C. Peacock, J. R. Cruz, Paul Calcaterra, and E. D. Carthey appearing by Lewis C. Teegarden, of the firm of Mantalica, Barclay & Teegarden, and defendants Local No. 2 of the Operative Plasterers and Cement Masons International Association, an unincorporated voluntary association, Local No. 194 of the Operative Plasterers and Cement Masons International Association, an unincorporated voluntary association, Local No. 343 of the Operative Plasterers and Cement Masons International Association, an unincorporated voluntary association, Local No. 400 of the Operative Plasterers and Cement Masons International Association, an unincorporated voluntary association, Local No. 489 of the Operative Plasterers and Cement Masons International Association, an unincorporated voluntary association, Local No. 739 of the Operative Plasterers and Cement Masons International Association, an unincorporated voluntary association, Local No. 838 of the Operative Plasterers and Cement Masons International Association, an unincorporated voluntary association, Operative Plasterers and Cement Masons International Association, an unincorporated voluntary association, Ray Carter, Reuben R. Partin, A. H. Gallardo, Al Lethbridge, Ray Baker, George Cole, Elmer Croshaw, Al Seay, Eugene D. Ferguson and Hugh L. Sosbee, appearing by Eugene Miller, of the firm of Brundage, Neyhart, Grodin & Miller, their attorneys, and oral and documentary evidence having been introduced on behalf of the parties, stipulations having been entered into during the trial, and the Court having dismissed the said action as to defendants E. D. Carthey and J. R. Cruz during the trial pursuant to stipulation of the parties, and the parties having theretofore having signed and filed a dismissal in writing with respect to all defendants sued herein under fictitious names, and the trial of the case having been completed on the 23rd day of May, 1961, and the Court having considered the case and being fully advised makes the following findings of fact:

I.

Plaintiffs Paramount Plastering, Inc., Keith Garrick, Inc., Doyle Plastering Co., Inc., Johnson & Fisher Plastering Contractors, Inc., Dave's Plastering Company, Inc., and M. J. Russo, Inc., are now and have been at all times hereinafter mentioned corporations organized and existing under the laws of the State of California; that all of said plaintiffs, except Johnson & Fisher Plastering Contractors, Inc. have their principal offices and places of business in the County of Los Angeles, State of California; and that Johnson & Fisher Plastering Contractors, Inc., is now and at all times hereinafter mentioned has been a corporation having its principal office and place of business in the County of Orange, State of California.

II.

Plaintiffs W. G. Brandt and G. Brandt are now and have been at all times hereinafter mentioned co-partners doing business under the fictitious name and style of Triple G Plastering. That on or about the 25th day of April, 1958, said last named plaintiffs duly caused to be published and filed in the office of the County Clerk of Los Angeles County a certificate of fictitious name under and pursuant to the provisions of Sections 2466 to 2470, inclusive, of the Civil Code of the State of California, wherein and whereby said last named plaintiffs stated that they were doing business under the fictitious name of Triple G Plastering, and stated their respective places of residence. That the said certificate was published once a week for four successive weeks in a newspaper published in Los Angeles County, and an affidavit showing such publication was duly filed with the said County Clerk within thirty days after the completion of such publication.

III.

Plaintiffs A. Rowland Maniord and Merle J. Carll are now and have been at all times hereinafter mentioned residing in the County of Los Angeles, State of California.

IV.

Defendants Local No. 2 of the Operative Plasterers and Cement Masons International Association, Local No. 194 of the Operative Plasterers and Cement Masons International Association, Local No. 343 of the Operative Plasterers and Cement Masons International Association, Local No. 400 of the Operative Plasterers and Cement Masons International Association, Local No. 489 of the Operative Plasterers and Cement Masons International Association, Local No. 739 of the Operative Plasterers and Cement Masons International Association, Local No. 838 of the Operative Plasterers and Cement Masons International Association, and Operative Plasterers and Cement Masons International Association, are now and have been at all times hereinafter mentioned, unincorporated voluntary associations functioning as labor organizations, and members and affiliates of the American Federation of Labor-Congress of Industrial Organization, a national labor organization. All of the hereinabove named defendants will hereinafter be referred to as "defendant unions". That the territorial jurisdiction of defendant unions, with the exception of defendants Operative Plasterers and Cement Masons International Association and Local No. 489 of the Operative Plasterers and Cement Mason International Association, includes the territory within the boundaries of the County of Los Angeles, State of California. That the territorial jurisdiction of defendant Local No. 489 of the Operative Plasterers and Cement Masons International Association, includes the territory within the boundaries of the County of Orange, State of California.

V.

Defendant The Contracting Plasterers' Association of Southern California, Inc., is now and has been at all times hereinafter mentioned a non-profit corporation organized and existing under the laws of the State of California, and having its principal office and place of business in the County of Los Angeles, State of California. That the members of such defendant corporation are now and have been at all times herein mentioned individuals, firms and concerns engaged in the business of acting as contracting plasterers within the geographical jurisdiction of the defendant unions hereinabove[illegible]scribed.

VI.

That the defendants Ray Carter, Reuben R. Partin, A. H. Gallardo, Al Lethbridge, Ray Baker, George Cole, Elmer Croshaw, Al Seay, Eugene D. Ferguson and Hugh L. Sosbee, were at all times up to a date on or about the 13th day of February, 1961 trustees of the trusts hereinafter described, and were at all such times residing within the geographical jurisdiction of the above-entitled court. That all of the above named said trustees were appointed and selected as such trustees by the defendant unions herein.

That the defendants C. A. Reischel, James C. Peacock and Paul Calcaterra, were at all times up to a date on or about the 13th day of February, 1961 trustees of the trusts hereinafter described, and were at all such times residing within the geographical jurisdiction of the above-entitled court. That all of the above named said trustees were appointed and selected as such trustees by defendant The Contracting Plasterers' Association of Southern California, Inc., for and in behalf of its members.

VII.

Jurisdiction of this action is conferred upon the above-entitled court by the provisions of subdivision (e) of Section 302 of the Labor Management Relations Act of 1947, as amended in 1959. (29 U.S.C.A., Section 186(c)(5)).

VIII.

Plaintiffs are now and have been at all times herein mentioned, contracting plasterers engaged in the lathing and plastering business in the State of California, and in the business of furnishing labor and materials for the purpose of constructing and installing lath and plaster on buildings and structures in the State of California.

IX.

That on or about the month of June, 1959, plaintiffs Paramount Plastering, Inc., Doyle Plastering Co., Inc., Johnson & Fisher Plastering Contractors, Inc., M. J. Russo, Inc., and Merle J. Carll, signed and entered into agreements in writing with the defendant unions. That photostatic copies of the agreements which said plaintiffs signed are attached to plaintiffs' original complaint on file herein and marked Exhibit 1, and reference is made to such photostatic copies herein. That except for the fact that each of the plaintiffs signed a separate agreement and for the difference in signatures resulting from the name of the business representative so signing, all of said collective bargaining agreements are identical in form and substance.

That each of said agreements specified and provided that plaintiffs shall abide by any amendments or modifications to another collective bargaining agreement which is therein referred to as being dated January 2, 1958, and said agreements also specified that plaintiffs should abide by any new agreement which might thereafter be entered into between the defendant The Contracting Plasterers' Association of Southern California, Inc., and the defendant unions.

X.

That following the signing of the agreements described under the preceding paragraph hereinabove, and prior to the filing of the above entitled action, The Contracting Plasterers' Association of Southern California, Inc. and the defendant unions signed and entered into a collective bargaining agreement in writing. That a true copy of such collective bargaining agreement is attached to plaintiffs' complaint on file herein, and reference is made to such document.

XI.

That between the dates of November 1, 1959 and January 1, 1960, plaintiffs Paramount Plastering, Inc., Johnson & Fisher Plastering Contractors, Inc. and Dave's Plastering Company, Inc., also signed counterparts of the said agreement, a copy of which is attached to plaintiffs' complaint on file herein and marked Exhibit 2, and reference is made to such document.

XII.

That under and pursuant to the provisions of subparagraphs B, C, and E of Article VI of the collective bargaining agreement (Exhibit 2), it was specified and provided as follows:

"B. Southern California Plastering Institute Industry Program

1. The Trust Agreement of the Southern California Plastering Institute Industry Program, as amended and modified, is a part hereof as though fully set forth herein.

2. The Contractors covered by this Agreement, in addition to compliance with all other provisions contained herein, shall pay to the Southern California Plastering Institute Industry Program, or its order, the sum of Four and

Three-Fourths Cents ($4\frac{3}{4}$¢) for each hour a man is to receive pay pursuant to the terms of this contract.

3. The Southern California Plastering Institute Industry Program may require payments to be made directly to it or may designate by written order an agent for deposit or collection. In the event no such agent or depository is named, said sums shall be paid to the Southern California Plastering Institute Trust for the benefit of the Southern California Plastering Institute Industry Program.

"C. Southern California Plastering Institute Trust

1. The Southern California Plastering Institute Trust, herein referred to as the Institute Trust, shall continue in existence for the purpose of collecting such sums as are due the various Trusts which are part of this Agreement, and to pay over to said Trust such sums as are collected. The Trust Agreement of the Southern California Plastering Institute Trust, as amended and modified, is made a part hereof as though fully set forth herein.

"E. Labor-Management Relations Trust

1. The Trust Agreement of the Labor-Management Relations Trust is made a part hereof as though fully set forth herein.

2. The Contractors covered by this Agreement, in addition to compliance with all other provisions contained herein, shall pay to the Labor-Management Relations Trust, or its order, the sum of One-Fourth Cent ($\frac{1}{4}$¢) for each hour a man is to receive pay.

3. The Labor-Management Relations Trust may require payments to be made directly to it or may designate by written order an agent for deposit or collection. In the event no such agent or depository is named, said sums shall be paid to the Southern California Plastering Institute

Trust for the benefit of the Labor-Management Relations Trust."

That the three trusts hereinabove referred to were embodied in three separate trust agreements, all of which were printed in a booklet, a copy of which is attached to plaintiffs' complaint on file herein and marked Exhibit 3, and reference is made to such document. The trust designated as "Southern California Plastering Institute Industry Program" is set forth on Pages 17 to 25 of such Exhibit 3. The trust designated as "Southern California Plastering Institute Trust" is set forth on Pages 1 to 5, inclusive, of such Exhibit 3, and the trust designated as "Labor-Management Relations Trust" is set forth on Pages 26 to 32 of such Exhibit 3.

XIII.

That each of the three above described trust agreements specify and provide that the employers and the employees shall be equally represented in the administration of such trusts through a Board of Trustees, one half of whom shall be appointed by the employers through their agency the California Plastering Association of Southern California, Inc., and the other one half of whom shall be appointed by the defendant unions. That the trust known and designated as the Southern California Plastering Institute Trust was maintained for the purpose of collecting contributions from plastering employers who were parties to the above mentioned collective bargaining agreements, and thereafter distributing and disbursing such monies to the other trusts referred to in the collective bargaining agreement, copy of which is attached to plaintiffs' complaint and marked Exhibit 2. That such trust agreement also authorized the trustees of such trust to pay out of the trust monies so collected, any other expenses incidental to the establishment and administration of such trust.

That the trust known and designated as the Southern California Plastering Institute Industry Program Trust was formed and maintained, among other things, for the purpose of selecting and carrying out a program of public relations for the general welfare and advancement of the plastering industry.

That the trust known and designated as the Labor-Management Relations Trust was formed and maintained for the purpose of expending funds for the common interest of labor-management relations of the parties to the above-mentioned collective bargaining agreements.

That none of the three above-described trusts were formed or maintained for any of the purposes permitted under Sub-section (c) of Section 302 of the Labor-Management Relations Act of 1947, as amended in 1959. That all three of the said trusts were for purposes other than those permitted and described under Section 302(c)(5) of the above-mentioned Act. That all of the said trusts have at all times been maintained from the contributions made by the employers who were parties to the collective bargaining agreements hereinabove described, and under and pursuant to the terms and provisions of such collective bargaining agreements requiring such contributions.

XIV.

On the 10th day of February, 1961, the defendants herein caused defendant Southern California Plastering Institute, Inc. to be incorporated under the laws of the State of California relating to non-profit corporations, and a true copy of the Articles of Incorporation of such corporation, which are on file with the Secretary of State of California is attached to plaintiffs' supplemental complaint on file herein and marked Exhibit 1, and reference is made to such document.

That the union and employee appointed trustees to the above described trusts who were appointed and designated by the defendant unions as Directors of said last named corporation are Ray Baker, George Cole, Elmer Croshaw, Sam F. Duffield, Eugene D. Ferguson, A. H. Gallardo, Al Lethbridge, Reuben R. Partin, Albert Seay and Hugh L. Sosbee. That the Directors of such corporation who were also designated by plastering employers as trustees under the three above described trusts are Clay M. Johnston, Robert W. Bolster, Paul Calcaterra, William L. Martin, James C. Peacock, C. A. Reischel and J. Carroll Duncan.

That in addition to the above named parties, George W. Glanders and Euel E. Petty were designated as Directors of such corporation by the defendant unions, and Paul Reimer, Ralph F. Jones, Victor A. Case, Reginald Hayward and Ray Arce were designated as Directors of such corporation by the plastering employers who were parties to the above described collective bargaining agreements.

XV.

That at or about the time of the incorporation of the corporation described under the preceding paragraph herein, such corporation duly adopted its By-Laws, and under Article II of said By-Laws, it specified who the members of such corporation would be as follows:

"The members of this Corporation shall consist of the following Local Unions and Contractors Associations:

Local 2 of the Operative Plasterers and Cement Masons International Association, A.F.L.;

Local 194 of the Operative Plasterers and Cement Masons International Association, A.F.L.;

Local 400; Local 489; Local 343; Local 739; Local 838;

Local 42 of Wood, Wire and Metal Lathers International Union, A.F.L.;

Contracting Plasterers Association of Southern California;

Lathing and Metal Furring Contractors Association of California, Inc."

That Section 7 of Article III of the By-Laws specified the number of votes that each of such members should have in connection with the election of Directors of the said corporation, and the language of said Section 7 is as follows:

"(a) Each member of the corporation shall be entitled to elect the number of directors set opposite their names as follows:

Local 2 of the Operative Plasterers and Cement Masons International Association, A.F.L.: 3 Directors.

Local 194 of the same union, 1 Director.

Local 400, 1 Director.

Local 489, 2 Directors.

Local 343, 1 Director.

Local 739, 2 Directors.

Local 838, 1 Director.

Local 42 of Wood, Wire and Metal Lathers International Union, A.F.L.: 1 Director.

Contracting Plasterers Association of Southern California: 11 Directors.

Lathing and Metal Furring Contractors Association of California, Inc.: 1 Director.

"(b) The Directors elected by the Contracting Plasterers Association of Southern California must be individuals actively engaged in the plastering contracting business in Los Angeles or Orange Counties.

The Directors elected by the Lathing and Metal Furring Association of California, Inc., must be individuals actively engaged in the lathing contracting business in Los Angeles or Orange Counties. In the event the Lathing and Metal Furring Contractors Association fails to exercise the privilege of electing a Director, that Director shall be elected by the Contracting Plasterers Association of Southern California, and must be a person actively engaged in the lathing contracting business in Los Angeles or Orange Counties."

That Section 1 of Article IV of the said By-Laws provided as follows:

"Subject to the limitation of the Articles of Incorporation, of the By-laws, and of the laws of the State of California, all corporate powers shall be exercised by or under the authority of a Board of Directors."

XVI.

That the purposes for which the last above described corporation was formed are described in its Articles of Incorporation as follows:

"The purposes for which this corporation is formed are:

(a) To promote industry betterment and industry public relations for the lathing and plastering industry.

(b) To encourage harmony between labor and management within the lathing and plastering industry.

(c) To carry out appropriate programs of public relations for the general welfare and advancement of the lathing and plastering industry.

(d) To gather and distribute the facts, data and other information relative to the use and benefits of lathe and plaster in general for the use and benefit of its members, the lathing and plastering industry as a whole and for public dissemination.

(e) To engage generally in any causes or objects similar to the foregoing in order to promote the lathing and plastering industry.

(f) To adopt By-Laws prescribing the duties of the officers and agents of the corporation, the detail of its organization, the time and manner of its meetings, and any and all detail incident to its meetings and conduct and management of its organization.

(g) To do any and all things which a natural person may do necessary or desirable for the general purpose for which the corporation is organized."

That in addition to the foregoing purposes, it was specified under Article III of such Articles of Incorporation that it had been organized pursuant to Part 1 of Division 3 of Title 1 of the California Corporations Code as a nonprofit corporation, and under Article V of the said Articles of Incorporation, it was specifically provided as follows:

"The specific and primary purposes of this corporation are for the promotion of the use of lath and plaster and for promoting harmonious relations between management and labor in the lathing and plastering industry in Southern California."

That the said Articles of Incorporation further provided that there should be twenty-four Directors of such corporation.

XVII.

That on or about the 13th day of February, 1961, the defendant, The Contracting Plasterers Association of Southern California, Inc., acting for and in behalf of the contracting plastering employers within the geographical jurisdiction of the defendant unions, entered into an agreement in writing with the defendant unions wherein and whereby the collective bargaining agreement, which is attached to plaintiffs' original complaint and marked Exhibit

2, was amended, and that a true copy of such agreement in writing so amending such collective bargaining agreement is attached to plaintiffs' supplemental complaint on file herein and marked Exhibit 2, and reference is made to such document for further particulars.

That under and by virtue of such amended agreement, the parties thereto substituted the defendant Southern California Plastering Institute, Inc. in lieu of the trust hereinabove described which was known and designated as Southern California Plastering Institute Industry Program, so as to enable the contributions which the collective bargaining agreement had theretofore required to be made to the three trusts hereinabove described to be made to the defendant Southern California Plastering Institute, Inc. That the specific manner in which such changes were accomplished by such amendatory agreement are as follows:

"(1) Article III (J) 2 (6) c was amended so as to substitute the name of defendant Southern California Plastering Institute, Inc. in lieu and in place of the name Southern California Plastering Institute Industry Program, and to thereby provide that income received by the Joint Conference Board on account of any cash bonds deposited with it, pursuant to the terms of Article III, should be paid to defendant Southern California Plastering Institute, Inc. in lieu and in place of Southern California Plastering Institute Industry Program.

"(2) Article III (J) 2 (11) was amended so as to substitute Southern California Plastering Institute, Inc. in lieu and in place of Southern California Plastering Institute Industry Program, and to thereby provide for the distribution of income received by the Joint Conference Board, or any trustee acting in its behalf, to Southern California Plastering Institute, Inc. in place of Southern California Plastering Institute Industry Program.

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"(3) Article V (c) 5 was amended so as to substitute the name Southern California Plastering Institute, Inc. in lieu of Southern California Plastering Institute Program, and to thereby provide that plaintiffs and all plastering employers should pay the differential of twenty-five cents per hour therein referred to, to defendant Southern California Plastering Institute, Inc.

"(4) The first paragraph under Article VI was amended by striking out the name Southern California Plastering Institute Industry Program and eliminating such Program from the provisions of Article VI, and the substitution of defendant Southern California Plastering Institute, Inc. in lieu and in place of Southern California Institute Industry Program.

"(5) Article VI (B) 1 was amended so as to make it read and provide that 'The Articles of Incorporation and By-laws of Southern California Plastering Institute, Inc. is made a part hereof as though fully set forth herein.'

"(6) Article VI (B) 2 was amended so as to provide for the payment by plaintiffs and all other plastering employers within the geographical jurisdiction of any of the defendant unions to defendant Southern California Plastering Institute, Inc. of the sum of five cents per hour for each hours work by any plasterer, and to provide that such payments shall be made at such time and place as the Board of Directors of defendant Southern California Plastering Institute, Inc. shall designate.

"(7) Article VI (B) 3 was amended so as to provide that defendant Southern California Plastering Institute, Inc. may require payments to be made directly to it or may designate by written order an agent for the deposit or collection of such payments.

"(8) Article VI (C) 1 was amended so as to provide that Southern California Plastering Institute Trust should continue to exist for the purpose of collecting such sums as are due 'the various Trusts', except those payments which were required under Article VI (B) 2 to be made directly to Southern California Plastering Institute, Inc. That under the said collective bargaining agreement, prior to such amendments, and under the terms and provisions of the trust agreement relating to Southern California Plastering Institute Trust, such last mentioned Trust had theretofore acted as the agency and trustee for collecting the monies from plastering employers which were being paid to all of the Trusts described under the trust agreement, copy of which is attached to plaintiffs' original complaint on file herein and marked Exhibit 3.

"(9) Article VI (E), relating to the Labor-Management Relations Trust, was stricken out entirely, thereby eliminating any reference in the collective bargaining agreement to such Trust.

"(10) Article VI (G) was amended by adding to the paragraph therein contained the following language: 'This section shall not be applicable to the Articles of Incorporation and By-laws of the Southern California Institute, Inc.' "

XVIII.

That the defendants herein, by creating defendant Southern California Plastering Institute, Inc. and making the amendments in the collective bargaining agreement as hereinabove described, intended to circumvent the prohibitions contained in Section 302 of the Labor- Management Relations Act (Section 186 Title 29 U.S.C.A.) which prohibit the payment by employers of any monies to any representative of employees, and the collection by any representative of employees from an employer of any monies, except as specifically provided under sub-section (c) of Section 302, by substituting a non-profit corporation as the entity authorized to collect the monies from the employers for the purposes contemplated and specified under the three Trusts which are designated in the collective bargaining agreement as Southern California Plastering Institute Trust, Southern California Plastering Institute Industry Program Trust, and Labor-Management Relations Trust, the trust agreements as to which are respectively set forth on pages 1 to 6, pages 17 to 26, and pages 26 to 33 of the trust agreement, copy of which is attached to plaintiffs' original complaint and marked Exhibit 3.

XIX.

There has been a dispute and controversy between plaintiffs, on the one hand, and the defendants on the other hand, respecting whether the collection by the three trusts hereinabove described of monies from the employers hereinabove mentioned, and the payment of such employers to such trusts constituted a violation of Section 302 of the Labor-Management Relations Act as amended in 1959, and as to whether or not such trusts could lawfully function and exist and collect and receive monies from employers for the uses and purposes for which such trusts were formed.

That since the incorporation of defendant Southern California Plastering Institute, Inc., there has been a dispute and controversy between plaintiffs, on the one hand, and the defendants on the other hand, respecting whether the collection by the said corporation of monies from the employers hereinabove mentioned, and the payments by such employers to said corporation constituted a violation of Section 302 of the Labor-Management Relations Act as amended in 1959, and as to whether or not such corporation could collect and receive monies from employers for the uses and purposes for which such corporation was formed.

That insofar as the right of such corporation to function and exist in the State of California is concerned, plaintiffs have no right to question its right or power to function as a non-profit corporation under the laws of the State of California, but plaintiffs do have the right to question by this proceeding the right of such corporation to collect and receive contributions from the employers hereinabove described, and to use such contributions for any of the purposes hereinabove described.

XX.

That the businesses of the plaintiffs affect interstate commerce in the United States of America in that each of the plaintiffs regularly purchases large quantities of lath and plastering materials which are produced outside the State of California, and which are shipped on some occasions directly to plaintiffs' building sites in California, and on other occasions are shipped to dealers and wholesalers within the State of California through whom plaintiffs have purchased such materials, and which are thereafter delivered by such dealers and wholesalers to building sites of plaintiffs.

That plaintiff Keith Garrick, Inc. purchased from sources outside the state, plaster board and hardwall plaster of a total value of $158,589.28 during the calendar year of 1960-1961. That during the calendar year of 1959-1960, the same plaintiff performed a lathing and plastering contract and did the lathing and plastering work at Nellis Air Force Base in the State of Nevada, and the total contract price paid to Keith Garrick, Inc. for such work was the sum of $255,280.00. That all of the materials which went into the job at the said site were procured and purchased from sources outside the State of California.

That plaintiff M. J. Russo, during the year of 1960, purchased hardwall plaster at a price of $50,828.93, which was produced outside the State of California, and from January 1, 1961 to April 30, 1961, purchased an additional amount of such hardwall plaster at a price of $6,795.07. That such plaintiff also, during the year of 1960, purchased plaster board which was produced outside the State of California at a total price of $16,393.85, and during the first four months of 1961 purchased additional quantities of such plaster board for a total purchase price of $2,249.09.

That other plaintiffs purchased and had delivered into the State of California for use in the State of California, materials as above described at a total price in excess of $175,000.00.

That in some instances the orders by the various plaintiffs for the said materials were placed through local wholesalers and suppliers, and in other instances they were purchased directly from the producer outside the State of California, and that such materials, after being produced outside the State of California, were customarily shipped in carload lots by rail into the State of California.

Conclusions of Law

From the foregoing Findings of Fact, the court hereby concludes, and as a matter of law, hereby decides:

1. That none of the purposes for which the three trusts hereinabove described or Southern California Plastering Institute, Inc. have been maintained and created come within the exceptions which are specified under Section 302(c)(5) of the Labor-Management Relations Act as amended in 1959. That none of such trusts nor such corporation are now or have been operating any trust fund established for the sole and exclusive benefit of employees of any employer, or the families or dependents of any such employees for providing medical or hospital care, pensions on retirement or death of employees, or for any other purpose permitted under Section 302(c)(5) of the Labor-Management Relations Act as amended in 1959.

2. That during the period of their existence, the three trusts hereinabove described and Southern California Plastering Institute, Inc. have been representatives of employees of employers who are parties to the collective bargaining agreements entered into with the defendant unions.

That one-half of the trustees of each of such three trusts have at all times been named and designated as such trustees by employees within the meaning of said Section 302 (c)(5), and are, therefore, representatives of employees within the meaning of such statute. That the said three trusts are, therefore, likewise representatives of employees within the meaning of the above-mentioned statute.

3. That one-half of the Directors of Southern California Plastering Institute, Inc. are now and have been at all times herein mentioned representatives of employees within the meaning of said Section 302(c)(5), and the Articles of Incorporation and the By-Laws of Southern California Plastering Institute, Inc. have been so drawn so as to assure equal control of the management and affairs of such corporation by representatives of employees and representatives of employers who are parties to collective bargaining agreements with the defendant unions herein. That the said corporation has been formed and created by the defendants herein for the purpose of taking over and carrying out the functions heretofore carried out by the three trusts hereinabove mentioned, including the function of collecting and receiving contributions from the employers pursuant to the provisions of the said collective bargaining agreements, and also, the disbursement of such contributions for purposes which are not authorized or permitted with respect to trusts under said Section 302(c)(5). That by reason of the control of the management and affairs of such corporation through the Articles of Incorporation and By-Laws as hereinabove described in the Findings of Fact, and by reason of the fact that one-half of the Directors of such corporation are required to be representatives of employees within the definition of the above-mentioned statute, said Southern California Plastering Institute, Inc. is likewise a representative of employees within the meaning and prohibition of the above-mentioned statute.

4. That none of the three trusts hereinabove described nor Southern California Plastering Institute, Inc. now have any right to collect or receive monies or contributions from plaintiffs or from any other employers who are parties to any collective bargaining agreements with any of the defendant unions. That any and all provisions contained in any of the collective bargaining agreements described in the Findings of Fact, including any amendments to any such collective bargaining agreements, and any and all provisions of the three trusts hereinabove described which contemplate, provide for or require the payment of monies to any of such trusts or corporation, or to any representatives of any such trusts or corporation, are null, void, and of no force and effect whatsoever, in that they are in violation of the prohibitions and provisions contained in Section 302 of the Labor-Management Relations Act as amended in 1959.

5. That plaintiffs are entitled to an injunction under and pursuant to the provisions of Section 302(e) of the Labor-Management Relations Act, as amended in 1959, enjoining and restraining the defendants and each of them from demanding, collecting, receiving or from attempting to collect or receive, any monies or contributions from plaintiffs or any of them.

Judgment and Decree

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That none of the purposes for which the three trusts hereinabove described or Southern California Plastering Institute, Inc. have been maintained and created come within the exceptions which are specified under Section 302(c) (5) of the Labor-Management Relations Act as amended in 1959. That none of such trusts nor such corporation are now or have been operating any trust fund established for the sole and exclusive benefit of employees of any employer, or the families or dependents of any such employees for

providing medical or hospital care, pensions on retirement or death of employees, or for any other purpose permitted under Section 302(c)(5) of the Labor-Management Relations Act as amended in 1959.

2. That during the period of their existence, the three trusts hereinabove described and Southern California Plastering Institute, Inc. have been representatives of employees of employers who are parties to the collective bargaining agreements entered into with the defendant unions. That one-half of the trustees of each of such three trusts have at all times been named and designated as such trustees by employees within the meaning of the said Section 302(c)(5), and are, therefore, representatives of employees within the meaning of such statute. That the said three trusts are, therefore, likewise representatives of employees within the meaning of the above-mentioned statute.

3. That one-half of the Directors of Southern California Plastering Institute, Inc. are now and have been at all times herein mentioned representatives of employees within the meaning of said Section 302(c)(5), and the Articles of Incorporation and the By-Laws of Southern California Plastering Institute, Inc. have been so drawn so as to assure equal control of the management and affairs of such corporation by representatives of employees and representatives of employers who are parties to collective bargaining agreements with the defendant unions herein. That the said corporation has been formed and created by the defendants herein for the purpose of taking over and carrying out the functions heretofore carried out by the three trusts, hereinabove mentioned, including the function of collecting and receiving contributions from the employers pursuant to the provisions of the said collective bargaining agreements, and also, the disbursements of such contributions for purposes which are not authorized or permitted with respect to trusts under said Section 302(c)(5). That by reason of the control of the management and affairs of such corporation through the Articles of

Incorporation and By-Laws as hereinabove described in the Findings of Fact, and by reason of the fact that one-half of the Directors of such corporation are required to be representatives of employees within the definition of the above-mentioned statute, said Southern California Plastering Institute, Inc. is likewise a representative of employees within the meaning of prohibition of the above-mentioned statute.

4. That none of the three trusts hereinabove described nor Southern California Plastering Institute, Inc. now have any right to collect or receive monies or contributions from plaintiffs or from any other employers who are parties to any collective bargaining agreements with any of the defendant unions. That any and all provisions contained in any of the collective bargaining agreements described in the Findings of Fact, including any amendments to any such collective bargaining agreements, and any and all provisions of the three trusts hereinabove described which contemplate, provide for or require the payment by employers of monies to any of such trusts or corporation, or to any representatives of any such trusts or corporation, are null, void, and of no force and effect whatsoever, in that they are in violation of the prohibitions and provisions contained in Section 302 of the Labor-Management Relations Act as amended in 1959.

5. That the defendants, the Unions, Ray Carter, Reuben R. Partin, A. H. Gallardo, Al Lethbridge, Ray Baker, George Cole, Elmer Croshaw, Al Seay, Eugene D. Ferguson, Hugh L. Sosbee, and each of them, be and they hereby are, permanently enjoined and restrained from demanding, collecting, receiving or from attempting to collect or receive any monies or contributions for any fund under their management or control from plaintiffs, or any of them, for purposes other than those set forth in § 302(c)(5) of the Labor Management Relations Act as amended in 1959. The defendants, George M. Raymond,

C. A. Reischel, James C. Peacock and Paul Calcaterra, and each of them, is and they hereby are permanently enjoined and restrained so long as they are acting as trustees or as directors or members of an organization con-jointly with any person selected or appointed by the defendant unions or the members of such unions, from demanding, collecting, receiving or from attempting to collect or receive any monies or contributions from plaintiffs, or any of them, for purposes other than those purposes which are expressly exempted from § 302(c)(5) of the Labor-Management Relations Act as amended in 1959. The defendant Southern California Plastering Institute, Inc., its directors, agents and employees, so long as any of the members of said corporation or its Board of Directors are the defendant unions or persons selected or appointed by the defendant unions, permanently enjoined and restrained from demanding, collecting, receiving or from attempting to collect or receive any monies or contributions from plaintiffs or any of them for any purposes other than those which are expressly exempted by § 302(c)(5) of the Labor-Management Relations Act as amended in 1959.

6. That pending the expiration of the time in which defendants have to appeal from this judgment and decree, and pending the final determination or disposition of any such appeal in the event any such appeal is taken and perfected, the injunction provisions hereinabove set forth be, and they hereby are, stayed.

7. That plaintiffs are entitled to their costs herein in the sum of $....................

Dated this 28th day of June, 1961.

/s/ Leon R. Yankwich,
Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Lodged June 13, 1961. Filed June 27, 1961. Entered June 28, 1961.

APPENDIX B

Opinion of the United States Court of Appeals for the Ninth Circuit

[¶ 17,912] Local 2, Operative Plasterers' and Cement Masons International Association, et al., Appellants v. Paramount Plastering, Inc., et al., Appellees.

United States Court of Appeals, Ninth Circuit: No. 17,572. November 7, 1962.

On Appeal from United States District Court, Southern District of California, Central Divison. Affirmed.

* * * * * * * * * *

Before Stephens, Barnes and Jertberg, Circuit Judges.

[*Statement of Proceeding*]

Barnes, C. J.: This is an action for declaratory and injunctive relief under the provisions of Section 302 of the Labor-Management Relations Act, as amended (hereinafter referred to as the L-MRA). Jurisdiction existed below as to the injunctive relief sought (Subdivision (e) of Section 302, 29 U. S. C. § 186(e)); and on appeal lies here (29 U. S. C. § 1291).

The declaratory relief sought rests on the provisions of 28 U. S. C. §§ 2201 and 2202, so long as jurisdiction is conferred by 29 U. S. C. § 186(e). We consider and hold this controversy a real and substantial controversy admitting of specific relief through a decree of conclusive character, and not an opinion advising what the law would be on a hypothetical state of facts. *Samuel Goldwyn, Inc. v. United Artists Corp.*, 3 Cir. 1940, 113 F. 2d 703.

The action originally was one for an injunction only, filed by certain employers engaged in the lathing and plastering business in the State of California. These plaintiff employers had signed, in June 1959, identical collective bargaining agreements with defendant unions.

Each agreed to abide by the terms of an agreement made on January 2, 1958, between defendant The Contracting Plasterer's Association of Southern California, Inc., and the defendant unions; and any new agreement between said last named parties.

Thereafter The Contracting Plasterer's Association of Southern California, Inc. and the defendant unions signed a new collective bargaining agreement. Some plaintiffs signed the new agreement.

[*Terms of Agreement*]

The new agreement contained the following provisions, in pertinent part, in Article VI:

> "B. Southern California Plastering Institute Industry Program
>
> 1. The Trust Agreement of the Southern California Plastering Institute Industry Program, as amended and modified, is a part hereof as though fully set forth herein.
>
> 2. The Contractors covered by this Agreement, in addition to compliance with all other provisions contained herein, shall pay to the Southern California Plastering Institute Industry Program, or its order, the sum of Four and Three-Fourths Cents (4¾¢) for each hour a man is to receive pay pursuant to the terms of this Contract.
>
> 3. The Southern California Plastering Institute Industry Program may require payments to be made directly to it or may designate by written order an agent for deposit or collection. In the event no such agent or depository is named, said sums shall be paid to the Southern California Plastering Institute Trust for the benefit of the Southern California Plastering Institute Industry Program.

"C. Southern California Plastering Institute Trust

1. The Southern California Plastering Institute Trust, herein referred to as the Institute Trust, shall continue in existence for the purpose of collecting such sums as are due the various Trusts which are part of this Agreement, and to pay over to said Trust such sums as are collected. The Trust Agreement of the Southern California Plastering Institute Trust, as amended and modified, is made a part hereof as though fully set forth herein.

* * *

"E. Labor-Management Relations Trust

1. The Trust Agreement of the Labor-Management Relations Trust is made a part hereof as though fully set forth herein.

2. The Contractors covered by this Agreement, in addition to compliance with all other provisions contained herein, shall pay to the Labor-Management Relations Trust, or its order, the sum of One-Fourth Cent (¼¢) for each hour a man is to receive pay.

3. The Labor-Management Relations Trust may require payments to be made directly to it or may designate by written order an agent for deposit or collection. In the event no such agent or depository is named, said sums shall be paid to the Southern California Plastering Institute Trust for the benefit of the Labor-Management Relations Trust.'"[1]

[*Contentions Advanced*]

Plaintiffs below urged that the three Trust Agreements mentioned (B, C and E, *supra*) were void, invalid and violative of the terms of the Labor Relations Act of 1947, as amended in 1959, in that: (1) they provided for payments by employers to representatives of employees of plaintiffs; (2) that moneys so paid were used for purposes other than those permitted under subsection (c) of § 302 of the L-MRA.

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[1] Article VI also contained paragraph A, relating to payments into an insurance program; paragraph D, relating to payments into a pension trust fund; and paragraph F, relating to a vacation plan. Such funds are not here involved.

As amended in 1959, 29 U. S. C. § 186(c) (5)[2] which proscribed payments, contained an exemption "with respect to money . . . paid to a trust fund . . . established for the sole and exclusive benefit of the employees . . . and their families and dependents, *provided:*"

> "A. That such payments are held in trust . . . for medical or hospital care, . . . pensions . . . [workmen's] compensation . . . or insurance therefor, or . . . unemployment benefits or life, disability, accident or sickness insurance."

Section 302(c)(6) provides a second exemption—

> ". . . with respect to money . . . paid to a trust fund . . . for pooled vacations, holiday, severance or similar benefits, or costs of apprenticeship or training programs."

As to both exemptions (5) and (6), *supra,* clause (B) of § 302(c)(5) was specifically made applicable, requiring that "written agreements" were essential, as well as "equal" representation between employers and employees in the administration of such fund, with an impartial umpire to be agreed upon in the event of a deadlock; for annual audits, and for open inspection of the accounts.

Subsequent to the filing of the original complaint, a supplemental complaint was filed. It added a second cause of action for declaratory relief seeking to hold invalid the trust which had evolved, since the filing of the original complaint, by reason of the transfer to the trustee (a California non-profit corporation, The Southern California Plastering Institute, Inc.) of all the functions of the three trusts hereinbefore described.

---

[2] Section 302(c)(5) of the L-MRA.

According to the allegations of the supplemental complaint, the articles of incorporation did not designate the members of the corporation but the By-laws, adopted on February 13, 1961, designated eight locals of various unions and two corporations representing employers as members. The voting rights of the members are divided as follows: Local 2 of the Operative Plasterers & Cement Masons International Association, A. F. L., 3 directors; Local 194 of the same union, 1 director; Local 400, 1 director; Local 489, 2 directors; Local 343, 1 director; Local 739, 2 directors; Local 838, 1 director; Local 42 of Wood, Wire and Metal Lathers International Union, A. F. L., 1 director; Contracting Plasterers Association of Southern California, 11 directors; Lathing and Metal Furring Contractors Association of California, Inc., 1 director.

[*Answers to Complaint*]

The answers of the defendants to the complaint and the supplemental complaint admitted the main facts, the existence of the original trust agreements and the assumption of its functions by the corporation in the collective bargaining agreement between the employers and the unions. The denials related merely to the validity and legality of the transaction. The answers to the supplemental complaint asserted that "the Southern California Plastering Institute, Inc. was incorporated for the purposes set forth in said Articles of Incorporation and for the purpose of creating an entity whose acts, conduct and operations would not lie within the proscriptions of any of the sections of the Labor-Management Relations Act." Also that the original defendants: "are not now collecting monies from plaintiffs or other contractors; that the defendant Southern California Plastering, Inc. is the only defendant now authorized to collect money from plaintiffs or other contractors."

[*Questions Presented*]

Union appellants state three questions are here involved:

1. Did Congress intend, by the exceptions in subdivision (c) of § 302 of the L-MRA to limit the type of funds which could be jointly administered by labor and management?

2. Does a trust or corporation become a "representative" of employees, within the meaning of § 302 merely because one-half of the trustees of the trust and one-half of the directors of the corporation are appointed by a labor organization where the purposes of said trusts or corporation are limited to promoting the use of lath and plaster in the construction industry?

3. Are payments by employers to such trusts and corporations within the prohibition of (a) and (b) of § 302?

Appellants Employers and Southern California Plastering Institute agree that the first two questions hereinabove mentioned are those here involved. (An affirmative answer to the third question raised above necessarily follows if questions one and two are answered affirmatively.)

Amicus Curiae National Bureau For Lathing and Plastering, Inc., a corporation urges the same first two questions, and adds a fourth: "Whether the District Court's interpretation of Section 302, if allowed to stand, results in a denial of due process, in that the interpretation renders the section void for vagueness."

An Amici Curiae brief is also before us from Painting and Decorating Contractors of California, Inc., Painting and Decorating Contractors Association of Los Angeles, Inc., District Council No. 36 of the Brotherhood of Painters, Decorators & Paperhangers of America, Los Angeles County Painting and Decorating Joint Committee, Inc.

It urges that the district court's application of § 302 to the facts of this case is unconstitutional; inconsistent with the remainder of the L-MRA; and contrary to the express intent of Congress, and that the Southern California Plastering Institute is not a "representative of employees."

Appellees agree as to the first question raised by appellants, treat the second question in two separate arguments (as to the "joint trusts" and the "corporation"), and raise a fifth issue: "Should a corporate entity set up for the express purpose of evading the provisions of Section 302 be disregarded?"

We need not reach the fifth question raised by appellees, because in our view the earlier questions raised control the case. We therefore accept the union appellants' statement of the questions involved, plus the due process question.

[*Answer to Questions*]

We answer the first three questions so raised affirmatively, and the fourth negatively. Congress did intend to limit the type of funds which could be jointly administered; both the trusts and the corporation created here are "representatives of employees;" the payments sought to be halted by plaintiffs are within the prohibition of § 302(a) and (b) of the Act, and not within the exemptions contained in § 302(c); and the district court's interpretation of § 302 does not render the section void for vagueness, nor does it result in a denial of due process.

[*Discussion*]

Congress, in passing the 1949 amendments to the L-MRA, acted, as appellees state, "very cautiously." Let us assume, arguendo, that the trusts originally created are n here involved, by mootness. We then have a corporation, Southern California Plastering Institute, Inc., organized, as the district court described it:

> "... as a general non-profit corporation under the non-profit corporation law of the State of California (California Corporations Code, §§ 9000, et seq.).

The objects stated in the Articles of Incorporation were these:

(a) To promote industry betterment and industry public relations for the lathing and plastering industry.

(b) To encourage harmony between labor and management within the lathing and plastering industry.

(c) To carry out appropriate programs of public relations for the general welfare and advancement of the lathing and plastering industry.

(d) To gather and distribute facts, data and other information relative to the use and benefits of lath and plaster in general for the use and benefit of its members, the lathing and plastering industry as a whole and for public dissemination.

(e) To engage generally in any causes or objects similar to the foregoing in order to promote the lathing and plastering industry.

(f) To adopt By-laws prescribing the duties of the officers and agents of the corporation, the detail of its organization, the time and manner of its meetings, and any and all detail incident to its meetings and conduct and management of its organization.

(g) To do any and all things which a natural person may do necessary or desirable for the general purpose for which the corporation is organized.

These objects are well within the purposes authorized by California law for non-profit corporations . . ."

[*Determination of Lower Court*]

The district court then disposed of the question raised below by appellees as to whether the Southern California Plastering Institute, Inc. "was engaging in the trust business without authorization." Such a question, ruled the district court, is one to be ruled upon only by the State of California.

> "[T]he State is the only power that can intervene to determine the truth of these allegations and take appropriate action, either by *quo warranto* or other authorized proceedings. (California Financial Code, §§ 3111-3132.) We cannot usurp that State function under the guise of a declaration of rights."

We agree.

[*Cited Opinion*]

We next compare the laudable purpose of the non-profit corporation with the restrictions contained in the L-MRA as to what funds can be set up and used. Did the original three trust funds and the later corporation perform functions forbidden by the Act? We quote with approval from Judge Yankwich's decision below:

> "The clause (§ 302(c)(5) and (6)) is an exception to the general provisions of the section, the aim of which is to proscribe the payment by employers and receipt by employee representatives in industries affecting commerce of bribes, gifts and gratuities, and to control monies paid into union trust funds as 'war chests' or for other purposes.
>
> "After the adoption of the statute (Taft-Hartley) so many variant interpretations, allegedly drawn from its history, were asserted that Judge Learned Hand in a dissent in a noted case, *United States* v. *Ryan*, 2 Cir. 1955, 225 F. 2d 417 [28 LC ¶ 69,341], complained that he found 'it impossible to extract any safe prin-

ciples'. (p. 427.) The Supreme Court granted certiorari in that case and its decision has become the guide to the meaning of the section. Especially insofar as it relates to the prohibition against payment to 'representatives' of the union. The entire clause as it stood before the 1959 amendment is printed in the margin (note).

"The important part of the *Ryan* decision, so far as it concerns this case, is contained in the following statement as to the scope of the exceptions: 'Nor can it be contended that in this legislation Congress was aiming solely at the welfare fund problem. Such a suggestion is supported neither by the legislative history nor the structure of the section. The arrangement of § 302 is such that the only reference to welfare funds is contained in § 302(c)(5). If Congress intended to deal with that problem alone, it could have done so directly, without writing a broad prohibition in subsection (a) and (b) *and five specific exceptions thereto in subsection (c), only the last of which covers welfare funds.* As the statute reads, it appears to be a criminal provision, *malum prohibitum,* which outlaws all payments, with stated exceptions, between employer and representative.' (*United States* v. *Ryan, supra,* p. 305). (Italics added.)

"As I read this extract it means just this, that subsection 5 is a declaration of the Congress that only welfare funds *coming within one of the five (now six) exceptions* are exempt from the sweep of congressional condemnation. Subsequent decisions of the Supreme Court confirm this view. (Italics by Judge Yankwich.)

"In *National Labor Relations Board* v. *Cabot Carbon Co.*, 1959, 360 U. S. 302 [37 LC ¶ 65,515], the high Court upheld the ruling of the National Labor Relations Board to the effect that a 'committee' of employees which deal with employers was forbidden by the Act, despite the insistence that 'to hold these employee committees to be labor organizations would *prevent employers and employees from discussing matters of mutual interest concerning the employment relationship.'* (p. 218). (Italics added.) To this the Court answered: 'The principal distinction lies in the unfettered power of the former to insist upon its requests. *Labor Board* v. *Jas. H. Matthews & Co.,* 156 F. 2d 706, 708 [11 LC ¶ 63,305]. Whether those proposals and requests by the Committees, and respondents' consideration of and action upon them, do or do not constitute "the usual concept of collective bargaining" (256 F. 2d, at 285 [35 LC ¶ 71,586]), we think that those activities establish that the Committees were "dealing with" respondents, with respect to those subjects, within the meaning of § 2(5) (of the National Labor Relations Act). (p. 214).

"In *Arroyo* v. *United States,* 1959, 359 U. S. 419 [37 LC ¶ 64,404], the majority of the Court held that in enacting the section the Congress were concerned with corruption of collective bargaining through bribery of employees representatives by employers and 'with the possible abuse by union officers of the power which they might achieve *if welfare funds were left to their sole control.'* (p. 426.) (Italics added.)

"I take these statements to mean that the *only* purposes for which joint administrative committees of employers and employees, *working within the framework of the Labor Management Relations Act,* (italics by Judge Yankwich) could act were those coming within the exceptions. This interpretation is confirmed by the added statement contained in the opinion: 'Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. See 92 Cong. Rec. 4892-4894, 4899, 5181, 5345-5346; S. Rep. No. 105, 80th Cong., 1st Sess., at 52; 93 Cong. Rec. 4678, 4746-4747. To remove these dangers, specific standards were established to assure *that welfare funds would be established only for purposes which Congress considered proper* and expended only for the purposes for which they were established. See Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 274, 290. *Continuing compliance with these standards in the administration of welfare funds was made explicitly enforceable in federal district courts by civil proceedings under § 302(e).*' (pp. 426-427.) (Italics added.) (note)

"The conclusion is reenforced by the statement in a later case, *Lewis* v. *Benedict Coal Corp.*, 1960, 361 U. S. 459 [39 LC ¶ 66,240], which reads: 'The provisions of the collective bargaining agreement creating the fund included the express provision that "this Fund is an irrevocable trust created pursuant to Section 302(c) of the 'Labor-Management Relations Act, 1947.' " Another provision specifies that the purposes of the fund shall be all purposes "*provided for or permitted in Section 302(c).*" In this way the agreement plainly declares what the statute requires, namely, that the fund shall be used "for the sole and exclusive benefit" of the employees, their families and dependents.' (pp. 464-465.)

"All cases interpreting this clause which have arisen since the decision in *Ryan, supra,* must be read in the light of its declarations and those contained in subsequent cases as to the scope of the limitations on the nature of trust funds. So read they warrant the conclusion that *the only* trust funds permitted are those in the six categories now contained within the exceptions. (Italics by Judge Yankwich.)

> "In the light of this, the contention of the defendants that the clause under discussion does not prohibit joint administration of trust funds, if they are established for other purposes than dealing with the employers 'concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work', (29 U. S. C. A., § 152(5)) cannot be sustained."

Judge Yankwich then differentiated *Conditioned Air & Refrigeration Co.* v. *Plumbing & Pipe Fitting Labor-Management Relations Trusts,* D. C. Cal. 1956, 159 F.Supp. 887 [32 LC ¶ 70,546], *affirmed,* 253 F. 2d 427 [34 LC ¶ 71,277], and *Sheet Metal Contractors Association of San Francisco* v. *Sheet Metal Workers International Association,* 9 Cir. 1957, 248 F. 2d 307 [33 LC ¶ 70,969]. He cited *Copra* v. *Suro,* 1 Cir. 1956, 236 F. 2d 107 [30 LC ¶ 70,094], and *Employing Plasterers' Association of Chicago* v. *Journeymen Plasterers' Protective & Benevolent Society of Chicago,* 7 Cir. 1960, 279 F. 2d 92, [40 LC ¶ 66,490] as supporting his conclusions. He quoted from *Mechanical Contractors Association of Philadelphia* v. *Local Union No. 420,* 3 Cir. 1959, 265 F. 2d 607 [36 LC ¶ 65,348]:

> "'Thus, the essence of Section 302 may be summarized as follows: No fund derived from employer contributions may be administered by persons designated by a union *unless the fund meets the standards set forth in Section 302(c)(5). Any employee-designee administering such fund not meeting the requirements of Section 302(c)(5) is a "representative" within the meaning of Subsections 302(a) and (b).* As was stated in *United States* v. *Ryan,* 350 U. S. at page 306, 76 S. Ct. at page 404 [29 LC ¶ 69,778], "if 'representative' means only the 'exclusive bargaining representative,' the explicit limitations on welfare funds in § 302(c)(5) may be easily evaded. Payments made directly to union officials, *or to other individuals as trustees,* would apparently be excluded from § 302. Thus, a narrow

> construction would frustrate the primary intent of Congress." (Italics supplied.).' "

and,

> " 'As was stated by Judge Hand in his dissenting opinion in *United States* v. *Ryan*, 2 Cir., 1955, 225 F. 2d 417, 425 [28 LC ¶ 69,341], subsequently adopted by the Supreme Court, "Since * * * the purpose of subsection (c) is to state exceptions to the preceding subsections (a) and (b), the payments that subsection (c) covers would fall within (a) and (b) except for the exception." ' (Italics added.)"

[*Reference to Other Cases*]

The able trial judge then observed that the restrictive interpretation of § 302(c)(5) was aided by the addition of § 302(c)(6) in 1959 (73 Stat. 573) covering pooled vacations, etc. Cost of apprenticeship training had been held a lawful purpose in *South Louisiana Chapter, Inc. v. Local Union No. 130 of the Int. Brotherhood of Electrical Workers*, E. D. La. 1959, 177 F. Supp. 432 [38 LC ¶ 65,855]; that "Congress . . . has been required to spell out its intent in order that Courts will not strike down, as illegal, labor and management-agreements, such as the one in suit, which promote harmony in an industry and redound to the benefit of the employer and employee alike."

But until Congress has spelled out such an intent, with respect to the activities specifically exempted, it is not the function of the courts to create additional exemptions. Such would be the result of a single court's belief as to what will or will not "promote harmony" and "redound to the benefit of the employer and employee alike." This court can believe that Congress might well have, or even *should* have, provided additional exemptions, permitting the setting up of laudable trusts that are vital to the preservation of the economic position of both labor and management, yet this court cannot be the arbiter of what such exemptions should be. That is the duty and responsibility of Congress. As Judge Yankwich ruled: Congress proscribed certain practices and permitted others in labor-management agreements, and permitted "joint trust funds for certain purposes only."

It is perfectly true, as the union contends, that there is not the slightest hint in the record that any of the trust funds here involved "has resulted in bribes, kickbacks, slush funds, racketeering or union war chests; nor do [plaintiffs] assert that this fund is under the sole control of the union." We accept that statement, with gratitude and happiness that it is true. But that does not prove that the trust fund is "not within the scope of the evil which Congress intended to eliminate." We agree with appellees and *Employing Plasterers' Association of Chicago v. Journeymen Plasterers' Protective & Benevolent Society of Chicago, supra,* wherein the court stated:

> "Section 302 is aimed primarily at the *prevention* of possible abuse, and not at providing a remedy for abuse actually perpetrated. . . . Where it is established that payment and acceptance is between employer and 'representatives' of employees, the issue in a suit for injunction becomes the legality of the welfare funds, *as measured by the statutory standards* of administration." (279 F. 2d at 97 [40 LC ¶ 66,490].) (Italics added.)

Gibas v. United States, 7 Cir. 1962, 300 F. 2d 836, 840 [44 LC ¶ 17,515].

Appellants urge that this "good purpose" of the funds so paid was but of *indirect* benefit to the employees, and not to their direct benefit. We find in the statute no language creating or recognizing such a distinction.

Judge Yankwich did not find it necessary to reach the differences between the powers and voting rights of the trustees of the original trusts, and those of the directors of the non-profit corporation. This because, in his opinion, the *purposes,* both of the trusts and the corporation, violated the collective bargaining agreement they were to implement.

Are these trust funds, and more particularly, is this non-profit corporation, a "representative" of the employees of a labor organization? Appellants admit that the trade promotion funds herein involved are not within any of the exceptions of subsection (c) of § 302. But they earnestly urge that neither are such funds within the proscription of § 302(a) and (b) because the payments are not made to a "representative of employees."

We agree with appellants that the factual situation here is not precisely comparable to that in the *Sheet Metal Contractors Association* case, *supra,* where the trustee, a Joint-Industry Board, aided disputes between labor and management arising from a collective bargaining agreement, set up arbitration committees, a forum to discuss the problems of the industry, and "cooperated" with "public bodies" with respect to legislation.

The Board in the *Sheet Metal* case, *supra,* had the authority and power "to study and correct improper working conditions and decide all controversies or disputes arising under this agreement." This court concluded:

> "The purposes of the Board indicate that it existed for the purpose at least in part of dealing with employers concerning grievances, [etc.]".

Our opinion presumed that "any dispute" between the parties to the agreement included "grievances," and concluded that the Joint-Industry Board satisfies the definition of "labor organization" contained in the original

Wagner Act (29 U. S. C. § 152(5)).[3] Here there was undisputed employee participation in a plan. If it existed, even in small part, for the purpose of dealing with employers concerning grievances or disputes, or conditions of work, it was then a "labor organization" within the 29 U. S. C. § 152(5) definition, and could be a "representative" within the 29 U. S. C. § 152(4) definition.[4]

[*Purposes of Corporation*]

We now turn to the purposes of the corporation, and the antecedent trusts. Plaintiffs' Exhibit 2, "Agreements and Declarations of Trust," indicates that six separate agreements were signed by the same parties on behalf of labor, and the same parties on behalf of management.

First: There was the "Southern California Plastering Institute Trust." It was the collecting agency for (a) the Insurance Trust; (b) the Industry Program; (c) the Pension Trust; and (d) the Labor-Management Relations Trust.

There was also (e) a Vacation Plan with a Vacation Fund Account to which amounts were payable under the collective bargaining agreements. The trustees of Southern California Plastering Institute acted as trustees for this fund.

As quoted above, the only trusts herein attacked were the *Industry Program*, the *Institute Trust*, and the *Labor-Management Relations Trust*. No question is raised as to the Vacation Plan, the Insurance Trust or the Pension Trust.

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[3] Which reads: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee *or plan* in which employees participate and which exists for the purpose, in whole *or in part*, of dealing with employers concerning grievance labor disputes, wages, rate of pay, hours of employment or conditions of work." (Italics added.)

[4] Which reads: "The term 'representatives' includes *any* individual or labor organization." (Italics added.)

The agreements setting up the respective trusts were all made a part of the collective bargaining agreement, "as though set forth in full." The Institute Trust had no purpose other than to act as a conduit for the moneys collected on their way to the other trusts.

Second: We find the Industry Program trust had certain stated purposes, functions and powers.[5]

---

[5] "Article V

"Functions and Powers

"A. The trustees shall have full power to select and carry out as they deem appropriate a program of public relations for the general welfare and advancement of the plastering industry, and shall assume existing contracts and liabilities of the Industry Program as previously carried on by the Southern California Plastering Institute.

B. The Industry Program shall continue to pay to the National Bureau of Lathing and Plastering, Washington, D. C. so long as said organization qualifies as a business league under the provisions of Section 501(c)(6) of Internal Revenue Code of 1954, the sum of ½¢ of each 4¾¢ received by the Industry Program for the purpose of improvement of business conditions of the lathing and plastering industry, but in no event shall this sum exceed $400 per week.

C. The Industry Trust shall have the right and power to receive payments from sources other than those provided in this contract for the purposes of trade promotion and advertising.

D. The Southern California Plastering Institute Industry Program may require payments to be made directly to it or may designate by written order an agent for deposit or collection. In the event no such agent or depository is named, said sums shall be paid to the Southern California Plastering Institute Trust for the benefit of the Industry Program.

E. The trustees of the Industry Program are hereby empowered to delegate to the Insurance Program the maintenance and operation of the office, personnel and records of the Industry Program. In such event the Industry Program shall pay that portion of the expense of said operation which is fair and reasonably attributable to the Industry Program in the opinion of the trustees.

F. The trustees shall have the power to do all things necessary to collect and receive funds due to the Industry Program by the

The purpose was to promote "industry betterment and industry public relations." The trustees were equally divided between the contractors and the union. (Art. III, ¶ B.) Under Article V, ¶ A, the trustees had full power to carry out, as they deemed appropriate, a program of

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terms of the labor agreement, addendum and modifications thereto, including the right to sue to recover said payments and costs of suit.

G. Without prejudice to the rights of the parties under the collective bargaining agreements with respect to their enforcement, The Board of Trustees shall have the power to enforce the payment of contributions to the trust by individual employers under the terms of the collective bargaining agreements or under any other promise to make such payments in any particular case or cases only where such action is specifically authorized by a resolution of the Board. If any individual employer defaults in the making of such payments and if the Board consults legal counsel with respect thereto, or files any suit or claim with respect thereto, there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such default.

H. The Board of Trustees shall procure fidelity bonds for each trustee or other person authorized to handle, deal with, or draw upon the moneys in the trust for any purpose whatsoever, said bonds to be in such reasonable amount and to be obtained from such source as the Board shall determine.

I. The Board of Trustees shall have power to authorize one person to sign checks drawn on the trust in amounts not exceeding $500. Except as covered by such authority, all checks, drafts, vouchers or other withdrawals of money from the trust shall be authorized in writing or countersigned by at least one trustee who is an employer representative and one trustee who is an employee representative.

J. The Board of Trustees shall maintain suitable and adequate records of and for the administration of the trust and all business relations thereto. The Board may require the employers, any individual employer, the union, and any individual employee to submit to it any information, data, report or documents reasonably relevant and suitable for the purposes of such administration. The parties agree that they will use their best efforts to secure compliance with any reasonable request of the board for any such information, data, report or documents.

K. The trustees shall cause to be made an annual audit of the trust by a C. P. A. and shall make available to all interested per-public relations for the general welfare and advancement of the plastering industry. Under Article V, ¶ M, the trustees could employ counsel and executive, administrative,

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sons a statement of the results of such audit at the principal office of the trust, and at such other places from time to time designated by the trustees.

L. No contractor actively engaged in the plastering business, no union official or business agent of the contracting unions, and no trustee of the trust shall be employed by said trust.

M. The Board of Trustees shall have power:

1. To establish and accumulate such reserve funds as may be necessary to provide for administration expenses and other proper obligations of the trust.

2. To employ such executive, administrative, clerical, secretarial and legal personnel and other employees and assistants as may be necessary in connection with the administration of the trust, and to pay or cause to be paid, out of the trust, the compensation and expenses of such personnel and assistants, the cost of office space, furnishings and supplies and other essentials required in such administration.

3. To consult with and secure the advice of legal counsel on any question of fact or law arising in connection with the administration of the trust, including at the request of either the employer trustees or the union trustees, advice on any question from legal counsel selected by the employer trustees and legal counsel selected by the union trustees who shall be directed to confer with each other and, if possible, submit a joint opinion to the Board, and in like manner to employ legal counsel or joint legal counsel in connection with suits or claims by or against the Board of the trust with respect to the trust, and to pay the reasonable costs of such legal services from the trust.

4. To incur and pay out of the trust any other expense reasonably incidental to the establishment and administration of the trust. To carry on all its functions under the name of Southern California Plastering Institute Industry Program and to carry any and all bank accounts in a trust fund under that name.

5. To invest and reinvest such portion of the trust as is not required for current expenditures and charges in such securities as are legal for the investment of trust funds under the laws of the State of California.

6. To adopt rules and regulations for the administration of the trust which are not inconsistent with the purpose and intent of this agreement."

clerical and secretarial help, and incur and pay any other expense reasonably incidental to the administration of the trust.

Under Article V, ¶ G, the trustees had the power "to enforce the payment of contributions to the trust by individual employers under the terms of the collective bargaining agreements or under any other promise to make such payments." Under Article V, ¶ J, the trustees had the power to require employers to submit any "information, data, report or documents reasonably relevant" to the administration of the trust.

Third: Under the Labor-Management Relations Trust created by the collective bargaining agreement, the functions and powers[6] of the six trustees (three appointed by

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[6] "Article IV

"Functions and Powers

"A. It shall be the function of the Trustees, and the Trustees shall have the power to expend the funds of the Trust for the common interest of labor-management relations of the parties to the Collective Bargaining Agreement, for the printing of necessary forms and documents required to facilitate the said Agreement, the printing of said Agreement and any amendments and addendum thereto, for secretarial or reporter's services required for meetings of labor-management negotiating committees, for legal services and other costs incurred by management-employed counsel, such as consultation, attendance at meetings, drafting of documents and litigation related to matters pertaining to said Agreement, and for other incidental costs and expenses of labor-management relations. None of the Trust Fund shall be used for any purpose contrary to or inimical to the Union or to the Contractor parties to the Collective Bargaining Agreement.

B. The Labor Relations Trust may require payments to be made directly to it or may designate by written order an agent for deposit or collection. In the event no such agent or depository is named, said sums shall be paid to the Southern California Plastering Institute Trust for the benefit of the Labor Relations Trust.

C. The Trustees shall have the power to do all things necessary to collect and receive funds due to the Labor Relations Trust by the terms of the Labor Agreement, addendum and modifications the unions, and three by the contractors) were "to expand the funds . . . for the common interest of labor-management relations . . . for secretarial or reporter's services required for meetings of labor-management negotiating committees,

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thereto, including the right to sue to recover said payments and costs of suit.

D. Without prejudice to the rights of the parties under the Collective Bargaining Agreements with respect to their enforcement, the Board of Trustees shall have the power to enforce the payment of contributions to the Trust by individual employers under the terms of the Collective Bargaining Agreements or under any other promise to make such payments in any particular case or cases only where such action is specifically authorized by a resolution of the Board. If any individual employer defaults in the making of such payments and if the Board consults legal counsel with respect thereto, or files any suit or claim with respect thereto, there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such default.

E. The Board of Trustees shall procure fidelity bonds for each Trustee or other person authorized to handle, deal with, or draw upon the moneys in the Trust for any purpose whatsoever, said bonds to be in such reasonable amount and to be obtained from such source as the Board shall determine.

F. The Board of Trustees shall have power to authorize one person to sign checks drawn on the Trust in amounts not exceeding $500. Except as covered by such authority, all checks, drafts, vouchers or other withdrawals of money from the Trust shall be authorized in writing or countersigned by at least one Trustee who is an employer representative and one Trustee who is an employee representative.

G. The Board of Trustees shall maintain suitable and adequate records of and for the administration of the Trust and all business relations thereto. The Board may require the Employers, any individual Employer, the Union, and any individual employee to submit to it any information, data, report or documents reasonably relevant and suitable for the purposes of such administration. The parties agree that they will use their best efforts to secure compliance with any reasonable request of the Board for any such information, data, report or documents.

H. The Trustees shall cause to be made an annual audit of the Trust by a C. P. A. and shall make available to all interested persons a statement of the results of such audit at the principal office for legal services and other costs . . . pertaining to said [Collective Bargaining] Agreement, and for other incidental costs and expenses of labor-management relations." The Trustees had under Article IV, ¶ J, similar powers

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of the Trust, and at such other places from time to time designated by the Trustees.

I. No contractor actively engaged in the plastering business, no union official or business agent of the contracting unions, and no Trustee of the Trust shall be employed by said Trust.

J. The Board of Trustees shall have power:

1. To establish and accumulate such reserve funds as may be necessary to provide for administration expenses and other proper obligations of the Trust.

2. To employ such executive, administrative, clerical, secretarial and legal personnel and other employees and assistants as may be necessary in connection with the administration of the Trust, and to pay or cause to be paid, out of the Trust, the compensation and expenses of such personnel and assistants, the cost of office space, furnishings and supplies and other essentials required in such administration.

3. To consult with and secure the advice of legal counsel on any question of fact or law arising in connection with the administration of the Trust, including, at the request of either the Employer Trustees or the Union Trustees, advice on any question from legal counsel selected by the Employer Trustees and legal counsel selected by the Union Trustees who shall be directed to confer with each other and, if possible, submit a joint opinion to the Board, and in like manner to employ legal counsel or joint legal counsel in connection with suits or claims by or against the Board or Trust with respect to the Trust, and to pay the reaonable costs of such legal services from the Trust.

4. To incur and pay out of the Trust any other expense reasonably incidental to the establishment and administration of the Trust. To carry on all of its functions under the name of Labor-Management Relations Trust and to carry any and all bank accounts in a trust fund under that name.

5. To invest and reinvest such portion of the Trust as is not required for current expenditures and charges in such securities as are legal for the investment of trust funds under the laws of the State of California.

6. To adopt rules and regulations for the administration of the Trust which are not inconsistent with the purpose and intent of this Agreement."

to those of the Industry Program Trustees mentioned above.

[*Conclusion*]

It should be noted generally that in the Industry Program Trust three-fourths of the trustees constituted a quorum,[7] but a majority of all trustees (not a majority of a quorum) governed "in the determination of any matter." In the Labor-Management Relations Trust, five of the six trustees constituted a quorum,[8] but a majority of all trustees (not a majority of a quorum) governed "in the determination of any matter." Thus both labor and management maintained an absolute veto on any proposed action. Such procedure satisfies the requirement of employees' "participation." No matter could be acted upon by either trust without "employee participation." We have already ruled in *Sheet Metal Contractors Association* v. *Sheet Metal Workers, supra,* that the term "employee participation" must, like the term "representative," be given a broad and inclusive meaning. Such an interpretation is required of us by *United States* v. *Ryan, supra.*

We note that this case was decided below largely on the written evidence produced by stipulation. Oral testimony was limited, and only addressed to the question of the amount of interstate commerce, a question not raised on this appeal. The court below, therefore, had no better opportunity than we have to scrutinize witnesses.

We conclude that the evidence in this case clearly establishes that the three trusts (Industry Program, Labor-Management Relations Trust, and the Institute Trust) as well as the succeeding corporate entity, are severally "representative" of employees as that term is used in § 302(a) and (b); and that the purposes, powers and functions of the trusts and corporation here involved are not within the exemptions created by Congress, and are not permissible objects for the use of joint trust funds.[9]

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[7] Article IV, ¶ G.

[8] Article III, ¶ G.

We do not quarrel in the slightest with the laudable objectives of the trust amicably created by labor and management in this case. We sympathize with the efforts of both labor and management to solve a vexing industry problem. But like so many of such present day problems, our duty is to rule in accordance with that which the Congress (quote) in its wisdom (end of quote) has seen fit to enact. We cannot widen the door when the doorsill has been carefully tailored by the representatives in Congress. The relief sought by the appellants herein must be found in congressional and not judicial action.

We *affirm* the judgment below.

Judgment

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed with costs in favor of the appellees and against appellants in this Court.

It is further ordered and adjudged that the appellees recover against appellants for their costs herein and have execution therefor.

Filed and entered November 7, 1962.

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[9] Nowhere has our attention been called to any attempt to comply, either in the trusts set up or the corporation, with the requirements of 29 U. S. C. § 186(c)(B) with respect to the naming of neutral persons empowered to break a deadlock between trustees or directors.

APPENDIX C

Pertinent provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C., Sec. 141, *et seq.*, are as follows:

Restrictions on Payments to Employee Representatives

Sec. 302. (a) It shall be unlawful for any employer *or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer* to pay, *lend,* or deliver, or [to] agree to pay, *lend,* or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce [.]; *or*

(2) *to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or*

(3) *to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or*

(4) *to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.*

(b) (*1*) It shall be unlawful for any [representative of any employees who are employed in an industry affecting commerce] *person* to *request, demand,* receive, or accept, or [to] agree to receive or accept, [from the employer of such employees] *any payment, loan, or delivery of* any money or other thing of value[.] *prohibited by subsection* (*a*).

> (*2*) *It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.*

(c) The provisions of this section shall not be applicable (1) [with] *in* respect to any money or other thing of value payable by an employer *to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or* to any representative *of his employees, or to any officer or employee of a labor organization,* who is *also* an employee or former employee of such employer, as compensation for, or by reason of, his service[s] as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; [or] (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of [the] employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities[.]*; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.*

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

(f) The section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

DEFINITIONS

SECTION 501. When used in this Act—

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person" and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended to read as follows:

* * * * * *

"Sec. 2. When used in this Act—

"(4) The term 'representatives' includes any individual or labor organization.

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

SUBJECT INDEX

PAGE

Argument 1

Introduction 1

I.

The court below correctly decided that a trade promotion fund is prohibited by Section 302 of the Labor-Management Relations Act 2

II.

The trust and the corporation were representatives of employees 5

III.

Review by the Supreme Court is not warranted 6

Conclusion 7

TABLE OF AUTHORITIES CITED

CASES

PAGE

Arroyo v. United States, 359 U. S. 419 ..... 3, 6

Association v. Westinghouse Elec. Co., 348 U. S. 437 3

Brennan v. United States, 240 F. 2d 253, cert. den. 353 U. S. 931 6

Commissioner v. Beck's Estate, 129 F. 2d 243 4

Conditioned Air & Refrigeration Co. v. Plumbing & Pipe Fitting Labor-Management Relations Trust, 159 Fed. Supp. 887, aff'd 253 F. 2d 427 6

Employing Plasterers' Association of Chicago v. Journeymen Plasterers' Protective & Benevolent Society of Chicago, 279 F. 2d 92 ..... 2, 6

Gibas v. United States, 300 F. 2d 836, cert. den. 371 U. S. 817 6

Mechanical Contractors Association of Philadelphia v. Local Union 420, 265 F. 2d 607 6

Sheet Metal Contractors Association v. Sheet Metal Workers International Association, 248 F. 2d 307, cert. den. 355 U. S. 924 6

United States v. Associated Press, 52 Fed. Supp. 362 2

United States v. Ryan, 350 U. S. 299 ..... 3, 5, 6

STATUTES

Labor-Management Relations Act, Sec. 302 ..... 2, 3, 4, 5

United States Code, Title 29, Sec. 186 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 789

LOCAL 2 of the OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, etc., *et al.*,

Petitioners,

vs.

PARAMOUNT PLASTERING, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

ARGUMENT.

Introduction.

All of the legal issues involved in the instant case were adequately determined by the courts below and by prior decisions of the Supreme Court and other Courts of Appeals. There is no conflict among the circuits. For those reasons, review by the Supreme Court is not warranted.

I.

The Court Below Correctly Decided That a Trade Promotion Fund Is Prohibited by Section 302 of the Labor Management Relations Act.

Section 302 of the Labor Management Relations Act as amended, 29 U. S. C. 186, contains a broad prohibition against payments of anything of value by an employer to a representative of his employees. That limitation is qualified by specified exceptions. Petitioner's claim that the specified exceptions are not exclusive.

It is clear however from decisions of the Supreme Court and of the Courts of Appeals that the only purposes for which funds can be created are those set forth in the statute. The language of the statute is clear and unambiguous, and therefore there is no room for interpretation nor for judicial policy-making.

Cf.:

> *United States v. Associated Press* (1943), 52 Fed. Supp. 362, 370.

Section 302, according to its legislative history, was enacted to prevent *possible* abuse and was not aimed at remedying evil actually perpetrated.

> *Employing Plasterers' Association of Chicago v. Journeymen Plasterers' Protective & Benevolent Society of Chicago* (7 Cir. 1960), 279 F. 2d 92, 97.

Nor was the prohibition of Section 302 directed solely at welfare funds as contended by Petitioners. The statute contains a broad proscription against all exchanges moving from an employer to representatives of his employees. If not, the purpose of Section 302 could easily be evaded by entitling a fund something other than "welfare fund."

In *United States v. Ryan* (1956), 350 U. S. 299, 305, it was declared:

> "Nor can it be contended that in this legislation, Congress was aiming solely at the welfare fund problem. Such a suggestion is supported neither by the legislative history nor the structure of the section. The arrangement of Section 302 is such that the only reference to welfare funds is contained in Section 302 (c) (5). If Congress intended to deal with that problem alone it could have done so directly, without writing a broad prohibition in subsections (a) and (b) and five specific exceptions thereto in subsection (c), only the last of which covers welfare funds. As the statute reads it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions between employer and representative."

That Section 302 contains a broad prohibition with only limited exceptions is further evidenced by statements in *Arroyo v. United States* (1959), 359 U. S. 419, 420, and in *Association v. Westinghouse Elec. Co.* (1954), 348 U. S. 437 n. 2.

Congress has amended Section 302 only once—in 1959—to approve apprenticeship programs, indicating that prior judicial decisions imposing a restriction on joint labor-management funds were within the legislative intent.

The trade promotion program held invalid by the courts below is within the letter and the spirit of the ban of Section 302. Trade promotion is a vague term. It has no specific standards, and the scope of permissible activity is difficult to define. There is not that specificity of definition and purpose found in trust funds expressly permitted by Section 302.

Assuming that the trade promotion program is not within the intent of Section 302, the final determination of that fact and amendment of the exemptions from Section 302 should be left to Congress.

Apropos here is the observation of the Court of Appeals for the Second Circuit in rejecting a suggestion that that court ignore the language of a tax statute to achieve what one of the litigants considered "a more just result." The court said:

> "Such a remaking of the legislation would require consideration of questions of legislative policy bearing on fiscal and economic matters and on administrative convenience; to discharge that task efficiently we would be obliged to hold a sort of Congressional Committee hearing, at which all interested persons would be heard, so as to be sure that our amendments would not entail unforeseen and undesirable results. We have no power to embark on such an enterprise."

Commissioner v. Beck's Estate (2 Cir. 1942), 129 F. 2d 243, 246.

The court below correctly held that any change in Section 302 should emanate from Congress.

II.

The Trust and the Corporation Were Representatives of Employees.

Both the trusts and the corporation were established as a result of the collective bargaining agreement and were financed by employer contributions based on hours worked by employees. The trustees and directors were elected or at least designated by the unions and were known as labor trustees or directors. [R. 204-205; 206.]

To state that the persons so designated were not representatives of the employees because they were now "trustees" or "directors" would lead to easy evasion of Section 302.

In the *Ryan* case at page 301, the Supreme Court pointed out that the term "representative" as used in Section 302 is not a technical term. The relationship between the union and the designee must be examined. The Court said (p. 304):

> ". . . A narrow reading of the term 'representative' would substantially defeat the Congressional purpose. . . .
>
> "Payments made directly to union officials or to other individuals as trustees, would apparently be excluded from Section 302. Thus a narrow construction would frustrate the primary intent of Congress."

The trustees and directors were representatives of the employees. To decide otherwise would reduce Section 302 to a "practical nullity". *United States v. Ryan* at page 306.

III.

Review by the Supreme Court Is Not Warranted.

Although the precise narrow issues pressed by Petitioners may not have been decided in any case prior to this one, the issues were determined by implication in other cases. There is no conflict among the circuit courts. Some of the appellate cases which have decided the legal issues involved here are:

Arroyo v. United States (1959), 359 U. S. 419;

United States v. Ryan (1956), 350 U. S. 297;

Gibas v. United States (7 Cir. 1962), 300 F. 2d 836, cert. denied 371 U. S. 817 (October 8, 1962);

Sheet Metal Contractors Association v. Sheet Metal Workers International Association (9 Cir. 1957), 248 F. 2d 307, cert. denied 355 U. S. 924 (1958);

Brennan v. United States (8 Cir.), 240 F. 2d 253, cert. denied 353 U. S. 931 (1957);

Employing Plasterers Association of Chicago v. Journeymen Plasterers Protective and Benevolent Society of Chicago (7 Cir. 1960), 279 F. 2d 92;

Mechanical Contractors Association of Philadelphia v. Local Union 420 (3 Cir., 1959), 265 F. 2d 607;

Conditioned Air & Refrigeration Co. v. Plumbing & Pipe Fitting Labor-Management Relations Trust (D. C. Cal. 1956), 159 Fed. Supp. 887, aff'd per curiam, 253 F. 2d 427.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of ceritorari should be denied.

Respectfully submitted,

EARL KLEIN,
Counsel for Respondents.